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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1967

No. 237

ARCHIE NATHANIEL BIGGERS, PETITIONER

vs.

TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION

PETITION FOR CERTIORARI FILED APRIL 1, 1967
CERTIORARI GRANTED JUNE 12, 1967

Supreme Court of the United States

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[fol. 3]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIVISION ONE

* * * *

INDICTMENT RETURNED BY GRAND JURY—October 1, 1965

ONE AGAINST: ARCHIE NATHANIEL BIGGERS

CHARGE: RAPE

/s/ RAYMOND H. LEATHERS
Judge

[fol. 4]

No. .....

Received 10/1/65, Carl Hawkins

STATE OF TENNESSEE

vs.

ARCHIE NATHANIEL BIGGERS (C)

MARGARET F. BEAMER (C), PROSECUTOR

RAPE

SUMMONS WITNESSES FOR THE STATE

Margaret F. Beamer, 2319 Mcharry Blvd.
Francesca Beamer, " " "
Paul Bass, Metro
Tom Cathey, Metro
Sgt. H. Woods, F. Bailey, Lt. McDaniel, Jr. Metro
Dr. W. J. Core

A TRUE BILL

/s/ J. H. Adkins
Foreman

Witnesses sworn in open Court and sent before the Grand Jury to testify in the above cause, this 1st day of Oct. 1965.

/s/ J. H. Adkins
Foreman of Grand Jury

HARRY G. NICHOL
Attorney-General

[fol. 5] IN THE CRIMINAL COURT OF
DAVIDSON COUNTY, TENNESSEE
DIVISION ONE

No. 19277

STATE OF TENNESSEE

vs.

ARCHIE NATHANIEL BIGGERS

* * * *

RAPE

ARRAIGNED, DEFENDANT PLEAD NOT GUILTY—
October 15, 1965

Came the attorney general who prosecutes for the state and the defendant in person, being represented by counsel, who being arraigned upon said indictments, plead not guilty to the same, and a copy of the indictments were given to the defendant.

Thereupon these cases are set for trial at a later date.

Mr. Alexander Looby and Mr. Avon Williams, Attorneys for the defendant.

Mr. John Hollins, Assistant Attorney General, for the state.

Ordered that court stand adjourned until tomorrow morning nine o'clock.

/s/ RAYMOND H. LEATHERS
Judge

[fol. 13] IN THE CRIMINAL COURT OF
DAVIDSON COUNTY, TENNESSEE
DIVISION ONE

19277

STATE OF TENNESSEE

vs.

ARCHIE NATHANIEL BIGGERS

RAPE

* * * *

JUDGMENT—December 3rd, 1965

Came the Attorney General who prosecutes for the state and the defendant in person, being represented by counsel, also the jury heretofore impaneled in this cause who were on yesterday respited from the further consideration of the cause on trial until the meeting of court today, came here into open court in charge of their sworn officers in whose charge they were placed on yesterday, and renewed their consideration of the cause on trial and they having heard the charge of the court, at which time the court excused the alternate juror, Mr. Charles W. Victory, and the aforesaid, retire to consider of their verdict and upon their oath aforesaid, do say: That they find the defendant guilty of rape and assess his punishment at confinement in the State Vocational Training School for Boys for a period of twenty years.

Thereupon the jury was discharged.

[fol. 14] It is therefore considered by the court that the defendant for his said offense of rape, shall be confined in the state vocational training school for boys for a period of twenty years, commencing on the date of his delivery to the keeper thereof, subject to the rules and regulations of said institution.

That he be rendered infamous, incapable of exercising the privileges of the elective franchise or of holding any office of profit, honor or trust in the state.

That the state of Tennessee pay the costs of this prosecution which will be certified to the comptroller for payment.

Thereupon the defendant, by his attorneys, gave notice of a motion for a new trial and he is allowed thirty days within which time to prepare and file said motion.

Mr. Alexander Looby and Mr. Avon Williams, ATtorneys for defendant.

Mr. John Hollins, Assistant Attorney General, for the State.

Ordered that court stand adjourned until tomorrow morning nine o'clock.

/s/ RAYMOND H. LEATHERS
Judge

[fol. 46] IN THE CRIMINAL COURT OF
DAVIDSON COUNTY, TENNESSEE

No. 19277

IN THE MATTER OF:

STATE OF TENNESSEE

v.

ARCHIE NATHANIEL BIGGERS

Nashville, Tennessee

BILL OF EXCEPTIONS:—November 29, 1965

BEFORE:

HON. RAYMOND H. LEATHERS, Judge
A
n
d
A JURY

APPEARANCES:

For the State: JOHN J. HOLLINS, Attorney General
For the Defendant: Z. ALEXANDER LOOBY, AVON N. WILLIAMS, JR.

[fol. 47]

* * * *

(A Jury was duly impaneled, examined, accepted and sworn)

(Jury is polled) (Alternate juror is selected)

(Witnesses are called)

THE COURT: Swear the witnesses, please.

(All witnesses are sworn by the Clerk)

THE COURT: Do you ask for the Rule, Gentlemen?

GEN. HOLLINS: I won't insist on the Rule as to character witnesses, but those on facts that are going to testify.

THE COURT: The Rule does not apply to character witnesses.

(The Rule was invoked, and the witnesses sequestered)

THE COURT: You might read your indictment,please.

(The indictment was read by Gen. Hollins.)

THE COURT: The plea of the Defendant, Mr. Looby.

MR. LOOBY: May it please your Honor, and Gentlemen of the Jury, to the indictment and each count thereof, express or implied, the Defendant pleads not guilty.

THE COURT: The first witness for the State, please.

EVIDENCE ON BEHALF OF THE STATE:

[fol. 48] GEN. HOLLINS: I am going to need a blackboard, if your Honor.please, if we can get it in. I thought we'd better get that in before I start.

MRS. MARGARET FRANCES WORK BEAMER, called as a witness on behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY GEN. HOLLINS:

Q Mrs. Beamer, I want you to speak up. It is necessary for all these Gentlemen of the Jury to be able to hear you. What is your full name, please, ma'am?

A My full name is Mrs. Margaret Frances Work Beamer.

Q Where do you live, Mrs. Beamer?

A I live at 2319 Meharry Boulevard.

Q That's here in Davidson County?

A That's right.

Q Are you married?
A Yes, sir.
Q And your husband is here in the courtroom?
A (no answer)
Q Or here to be a witness today? at any rate?
A Yes, he's here in the courtroom.
Q Do you have children, Mrs. Beamer?
[fol. 49] A I have five children.
Q And what are their ages, please, ma'am?
A I have a boy six, a girl twelve—thirteen, a girl seventeen, a boy nineteen, and a boy twenty-three.
Q Now, who lives at home with you?
A My boy six, and the two girls, thirteen and seventeen.
Q Is one of your daughters up here with you today to testify?
A That's right. The one that's thirteen.
Q Now, back on January the 22nd of this year, did you live at the same place you do today?
A Yes, sir.
Q Where are you employed?
A I am employed at Hubbard Hospital.
Q In what capacity?
A I am a licensed practical nurse.
Q How long have you been a LPN, and how long have you worked for Hubbard Hospital?
A I have been a LPN for fifteen years, and I have worked at Hubbard Hospital fifteen years.
Q Now, on the night of January the 22nd—what day of the week was it, by the way?
A It was on a Friday night.
Q Do you recall what time you got home that night?
[fol. 50] A Oh, I worked the day shift at this time, and I got home a little after 3:00. Oh, I'd say around 3:15.
THE COUTT: Speak a little louder.
A Between 3:15 and 3:30.
GEN. HOLLINS: Was anybody else there at home with you?
A Yes, my two children were at home with me.
Q And at any time was your husband at home?

A Yes, my husband had been at home shortly before it happened.

Q All right, now, getting on to the central facts of this case, did you or didn't you, at any time, have occasion to see this Defendant?

A No.

MR. WILLIAMS: Well, he—if your Honor please, we object—

A Well, now, I could really put it—

THE COURT: Overrule the objection. Note an exception.

MR. WILLIAMS: Also object to cross—to any cross examination on this.

THE COURT: Overruled. Go ahead, General.

GEN. HOLLINS: Was the Defendant, at any time, at your home?

A If he was, I didn't see him.

Q You didn't see him?

A I did not see him.

Q Until—

MR. WILLIAMS: I object, if your Honor please.

[fol. 51] THE COURT: Yes, sir, that's—leading.

GEN. HOLLINS: All right. Then you go ahead and tell the Jury what happened.

A Well, I'd say it was approximately around 9:00 o'clock that night—Friday night—and my husband had just left around 10 minutes before this happened, and I had been in the living room sewing, and when I left out of the living room to go into the bedroom,—there's a little hallway—and, as I went into the little hallway, I was grabbed from behind, and more or less grappled to the floor, and I began screaming, and when I looked up—I was on the floor, and he had his arms around my neck, and when I looked up, he had a butcher knife over me.

Q Now, who is he?

A Mr. Biggers.

Q I see. A. And he told me to stop screaming, and I—when I was screaming so loudly, my daughter who was in the other room, came out of her bedroom to see

what was happening, and when she seen what was happening, she began screaming, and, at that time, he told me, he said, You tell her to shut up, or I'll kill you both. And I asked him to let her go back into her room and don't bother her. He said, She can go back in her room, and you do what I say, or I'll kill you. And he asked me —made me go out of the back door down to the—out in the back yard, and the railroad crossing—in fact, the [fol. 52] railroad track is right next to my house—and it's up an incline to get to the track, and he had me to go up the track—up on the track—and about a block or two down, and then back down off of the track, into a little wooded area,—it's kind of overgrown, and that's where he had me to undress and have relations with him. And all—

GEN. HOLLINS: All right. With your consent, or against your consent?

MR. WILLIAMS: The question is objected to.

THE COURT: All right. It's a proper question. Overruled. Go ahead. Did you understand his question: With your consent, or against your consent?

A Against my consent.

THE COURT: All right.

A All the time he was telling me, and I was crying, said, Shut up! or else I'll kill you! and he had the butcher knife, and I was begging him to let me go back and he said, If you do what I tell you to do, I'll let you alone, and let you go back home, and I was begging him to let me go back home with the children. When he finished, he let me put my clothing back on, my pants—and my panties—and he let me go back up the railroad track. And I made my way down—back down the railroad track, to my house, and he went off in the opposite direction, running.

GEN. HOLLINS: Now, Mrs. Beamer, this incident occurred approximately how far from your house?

A It was around two blocks.

[fol. 53] Q Now, look, if you will, please, ma'am, come down to the blackboard and draw where your house, and railroad and surrounding area is, if you will.

(witness drew on blackboard)

Q Now, does Meharry Boulevard go over or under the railroad?

A It goes under—there's a place where you can go under the railroad.

(She draws some more)

Q Now, draw the house next to you, and show where it is.

(She draws)

Q All right. Now, if you will, stand over to the side, now, so the Jury can see it. All right, now, first what is this that you have got there near the railroad? Step back so all the Gentlemen on the Jury can hear you. What is that up there near the railroad?

A Up near the railroad?

Q Yes, ma'am?

THE COURT: There is a pointer there, if you wish to use it, hanging on the side, and You can stand back and use the pointer.

A This is the—

GEN. HOLLINS: You've got to speak up now, so all these Gentlemen can hear you.

[fol. 54] A This is the railroad that runs down by my house. It's right here. It has a sharp incline—sort of up on a hill.

Q All right.

A It does have a bank and overgrowth—

THE COURT: Speak up a little louder, please. The Jury isn't going to be able to hear you.

GEN. HOLLINS: Speak up real loud.

A It has an embankment on both sides, against the railroad track, and there is overgrowth all along the banks.

Q All right. Point to your house.
A Here sits my house.
Q All right. Now, what is—what does this right here represent?
A This is the neighbor's house, next to mine.
Q Who lives there?
A Mattie Beech. Mattie Beech.
Q Is she an old lady? or young lady?
A Very old. Very often she's in the hospital.
Q Now, how do you get to your house?
A Get to my house? Come down here. My house sits back, in the yard. You can almost say to the side.
Q Has it got a sidewalk? or path? what do you have? to get to your house?
A Stepping stones lead up to my house.
[fol. 55] Q Point out to the Jury where in the house you were when you first saw this Defendant. And what part of your house is that?
A This is the hall—between the kitchen door and the living room door. I had just went out of the living room door and he must have been right in here—standing right out there in the hall.
MR. WILLIAMS: We object.
THE COURT: Yes, sir.
GEN. HOLLINS: Well, when you first saw him, then?
A Right here.
Q All right. Now, was there any light in the hall?
A No light in the hall.
Q What about the living room and bedroom?
A Light in the living room, light in the bedroom and light in my bedroom.
Q Now, point to the bedroom where your daughter was when this happened.
A My daughter was here in this bedroom.
Q Now, show the Jury how you left the house?
A Left the house through the kitchen door. Went out in the back yard. Went here right through the drive, and up the railroad track—into the alley and up the railroad track—

THE COURT: Tell her to keep her voice up, General.
[fol. 56] A Up on the railroad track—up on the incline to the railroad track, down the track.

GEN. HOLLINS: Do you mind speaking a little louder. If I can hear you, I know the Jury can. You went down the railroad track to where?

A Down to here (she marks on the blackboard)

Q Well, now, will you mark actually about where you were on—on that night when this attack occurred?

A Right here. (She marks)

Q All right, now, you can put that down and have a seat back up here on the stand.

Can you describe the exact area where this assault took place? What was the condition of the ground there?

A At the time the ground was dry—I think, well, it had all the leaves, grass, maybe some twigs, trees, small trees, foliage shed, I mean there were no leaves on the trees, but it was—looked like people had walked on it down in there, kind of worn with feet, you know.

Q Was it thick? or could you see down in there?

A When you get down in there, it's not too thick, but just looking at it, it is impassable—you can't drive a car.

Q This—

A But you can walk.

Q This route that you took—did you go by any [fol. 57] house?

A No, not any house. It was on the track.

Q Did you go straight on the track from your house? and, in the course of going up there, did you see any other person?

A I didn't see anyone coming or going.

Q Now, was it completely dark that night? Was there any light anywhere?

A There was a moonlight night, with a few clouds. And street lights on down on the street, not on the track. But it did extend up over the track. Taller than the track was.

Q Now, what about the light in your house? Good enough so that you can see people in the house when the light's on?

A Well, I—

MR. WILLIAMS: We object to leading, your Honor, please.

THE COURT: Yes, don't lead her, General. Let her —let her tell you.

GEN. HOLLINS: Well, just describe to the Jury what the condition of lighting is there in your house, at night.

A Well, I have been told you can stand on the track, and look down in my house. Now, that's the way I understand—

MR. WILLIAMS: We object to what she has been [fol. 58] been told, your Honor, please.

THE COURT: What are the lighting conditions in your house?

GEN. HOLLINS: Will you just describe to the Jury what the lighting conditions inside your house are—not looking down—after you get inside.

A Well, the lighting conditions inside my house, I guess, is ordinary. We have lamps, all overhead, well—lamps in the living room, and overhead ceiling lights in the kitchen and—

Q Is it well lighted, or poorly lighted?

A Well lighted.

Q Now, how close were you—from the Defandant when you were inside? How close was he to you? Just—

A Well—uh—

Q Close as I am? or farther? away?

A He had his arm around my neck (both she and Atty. Gen. talk at the same time)

THE COURT: He asked you—

A He had his arm around my neck. He was that close. I was—he was—just—and just a little while on the floor, looking up in his face, is how close I was.

Q Are you able to describe this man, other than seeing a butcher knife?

A No, other than I remember the blade being shiny.

Q Well, was it a long knife? or short knife?

A It was a butcher knife—long blade.

[fol. 59] Q What did you do after you got loose?
A After the assault took place?
Q Yes, ma'am?
A I went back to my house to see if the children were all right. I don't have a telephone. So I went down the—uh—the street to the restaurant and called—and had the owner of the restaurant call the police.
Q And did the police come?
A Yes. And I went directly back home.
Q And—uh—were you taken anywhere?
A The police carried me to Hubbard Hospital.
Q What took place there, if anything?
A I was examined by Dr. Core.
Q All right. What examination did he give you?
A He gave me a vaginal examination.
Q Now, were you, at any later date, shown any pictures by any one?
A Yes, I was shown pictures on several occasion.
Q By whom?
A By law enforcement officers. Came to my house with pictures. I also came over to the building across the street. Police station.
Q What did you do over there?
A Well, I went over and looked at pictures in the [fol. 60] files. I was carried over to look through the files.
Q Did you look at many pictures? or few pictures?
A I looked at many.
Q Did you ever pick out any picture?
A I picked out one picture of a man that I said had features was the only one that I said was the one.
Q Did you, at any time, identify this Defendant?
MR. WILLIAMS: That's objected to.
GEN. HOLLINS: I don't see how else she could answer.
THE COURT: Overrule the objection. Note an exception. Go ahead. (to the witness) Did you, at any time, identify the Defendant?
A The one—at the time that I identified the Defendant?

GEN. HOLLINS: Yes, ma'am?

THE COURT: The question was, Did you, at any time identify the Defendant?

A Yes.

THE COURT: Now, you can explain about it.

GEN. HOLLINS: How did you happen to be at the police station on that occasion?

MR. WILLIAMS: May it please the Court, I object to that as being leading.

THE COURT: Just a minute.

[fol. 61] GEN. HOLLINS: Withdraw the question.

THE COURT: Yes, sir.

MR. WILLIAMS: Yes, sir, and I objected—

THE COURT: And I sustain the objection. Never mind.

MR. WILLIAMS: If the Court—

THE COURT: Never mind. I sustained your objection to the question. (to the witness) Now, you said you had identified him. Now, you may explain where you identified him.

MR. WILLIAMS: May it please the Court, may I address the Court just a second? I woud like to object, at this time, on the record, to adversary counsel shouting and having the asperity in his tone of voice when I object. I don't want the Jury to get the idea that I'm doing something—that he's trying to convey that I'm doing something unreasonable when I am trying to see that the evidence that is introduced in this case is competent evidence, and is not incompetent evidence.

THE COURT: All right. You—you made a timely suggestion. Let's move along, Gentlemen.

GEN. HOLLINS: Let the record show that I am objecting to his argument to the Jury in the form of an objection.

Where did you make the identification, if any place?

A I made the identification at the—I suppose at the police department.

THE COURT: Across the street?

[fol. 62] A Across the street.

THE COURT: —at the Safety Building? Is that where you are talking about? across the street?

A That's right.

THE COURT: All right.

GEN. HOLLINS: How did you happen to be there?

A I was brought by officers to identify, if I could.

Q Were you able to?

A Yes, I was able to.

Q Was that before or after something appeared in the newspaper?

A It was just—

MR. WILLIAMS: Well, that's objected to. Well, that's all right. Let it go.

THE COURT: Go ahead. That objection?

MR. WILLIAMS: Go ahead.

GEN. HOLLINS: Before or afterward?

A It was before the picture was published, the next morning.

Q How long before?

A I identified on the afternoon, and the picture came out in the morning paper.

Q Are you telling this Jury today that you have any doubt about this? or do you have any doubt about this?

[fol. 63] A No, I don't have any doubt.

Q What physical characteristics, if any, caused you to be able to identify him?

A First of all,—uh—his size,—next I could remember his voice.

Q What about his voice? Describe his voice to the Jury.

A Well, he has the voice of an immature youth—I call it an immature youth. I have teen-age boys. And that was the first thing that made me think it was the boy.

Q Was it low, or high?

A No, it was medium-pitched voice of a young man not an old man, not mature.

Q Was it loud, or soft?

A He talked soft.

Q At the time you identified him, did you hear him talk?

A Yes. I heard him talk.

Q What, if anything—

A At the time of identification.

Q What, if anything, did he say?

A Would you repeat that, please?

Q What, if anything, did you hear him say, at the time of the identification?

A Oh, I believe it was, Shut up, or I'll kill you, or [fol. 64] words to that effect.

Q All right. What else? Can you describe the beard that the man had that raped you?

MR. WILLIAMS: May it please the Court, I object.

GEN. HOLLINS: That's a—

THE COURT: Just a minute. There's been no proof that this man had a beard. And you said, Can you describe the beard? Now, there's been no—

GEN. HOLLINS: Did he have it?

THE COURT: Gen. Hollins, rephrase the question.

GEN. HOLLINS: All right, sir. Did the man originally have a beard?

A No, when he placed his face against mine—that was another thing, his skin was rather smooth, as, you know, someone that didn't shave. His hair was the next thing.

Q What about his hair?

A Sort of bushy.

Q Is it like it is today? or was—

MR. WILLIAMS: Well, we object to that, if your Honor please.

A Well, not bushy—

THE COURT: Just a minute. Overrule your objection and note an exception.

MR. WILLIAMS: Yes, sir.

THE COURT: Go ahead. Answer the question.

A Yes, the hair—a little longer than it is now, but [fol. 65] —at the time when I identified him it was a little longer.

THE COURT: Speak up. You let your voice drop down. At the time you identified him, what?

A The hair.

Q Was what?

A Was a little longer.

Q A little longer than it is now? All right.

GEN. HOLLINS: What about his physique?

A Well, as I said, the size. He had—well at the time he raped me, his shirt was unfastened, and he had a large kind of flabby abdomen and breasts.

Q What about those—

A Kind of flabby big breasts. As I say, the abdomen was fat.

Q Is there any doubt in your mind today?

MR. WILLIAMS: He has asked her that before, Judge. We are going to object to it.

THE COURT: All right. Is there any doubt in your mind?

A No, there's no doubt.

GEN HOLLINS: Your witness.

THE COURT: Cross examine. All right, Mr. Looby.

CROSS EXAMINATION

BY MR. LOOBY.

Q Mrs. Beamer, on what day did this occur?

[fol. 66] A On what day?

Q Yes?

A January the 22nd.

Q And what date did you first identify him?

A I believe it was August the 17th.

Q So, from January the 22nd, up until August, you didn't know who raped you?

A (hesitates)

THE COURT: Did you understand his question?

A No. Let him repeat it again.

THE COURT: He said from January the 22nd to August the 17th, you don't know who raped you, I believe was his question.

A That's correct.

MR. LOOBY: Mrs. Beamer, you know where I live? on Meharry Boulevard? at 2012 Meharry Boulevard? you know that?

A (hesitates)

THE COURT: You know where he lives—Mr. Looby? You know where he lives?

A Sure. I know where you live, very well.

Q by MR. LOOBY: How far is that from where this took place?

THE COURT: I don't believe she heard you, Mr. Looby.

MR. LOOBY: How far is that from where the occurrence took place?

A Far from your house to that?

Q Yes?

[fol. 67] A Oh—about four blocks.

Q That's where the road runs across from the park? isn't it?

A That's right.

Q Now, what street does it run off of in a northerly direction? What street does it run off?

A Northerly?

Q Yes? Direction. Yes.

A Jefferson. And it runs over Scoville.

Q What?

A Scoville.

Q Scoville?

MR. WILLIAMS: You mean in a southerly direction.

MR. LOOBY: Huh?

A You said northerly direction?

Q From a—running in a southerly direction from Meharry Boulevard—running southerly.

A Southerly? and northerly? Almeda.

Q Where does it go? It runs on Almeda? or under?

A Over Almeda.

Q Can you drive onto the railroad at Almeda?

A Yes, that's directly in the back of me.

Q I see, and what other street does the railroad run over?

A I am not sure. Albion. I am not sure, about that.

[fol. 68] I never go back that far.

Q You mean that—

A There's maybe a dead end.—

Q So you don't know—

A —on that.

Q —you don't know the topography two blocks away, you say this happened?

A I know where I was carried to.

Q Now, what we are trying to find out is where you were carried, or were there railroad tracks, or not.

A I went along the top of the railroad tracks.

Q On top of the railroad tracks?

A And then down into this undergrowth.

Q How did you get up on the railroad, Mrs. Beamer?

A They have pathways.

Q And he carried you up the pathway to the railroad?

A He carried me up the pathway.

Q Up on the railroad tracks?

A And back down.

Q And you went all the way up on the railroad tracks?

A That's right. He followed closely behind me, with the knife.

[fol. 69] Q And that's why you left your daughter alone?

A That's right. He told me to do what he told me to do, or either he'd kill us.

Q I didn't ask you what he would do.

A My daughter was at home.

Q You left your daughter at home?

A I had no choice.

Q But you did leave your daughter at home?

A Yes, I left my daughter at home.

Q And she knew what was going on?

A She didn't know what was going on.

Q She didn't know?

A No, she didn't.

Q Didn't she come out there and he told her to get back in?

A He told her to go back in her room.

Q She didn't know what was happening, then?

A She didn't know.
Q She knew he took you out, didn't she?
A No, she said she didn't know.
Q She didn't know that he took you out?
A No.
Q Well, when he came—when she came in the room where you were, what was his position then?
A (hesitates)
[fol. 70] Q What was he doing then?
A I was on the floor, and he was standing up over me with the butcher knife.
Q And she saw that, didn't she?
A I am not sure.
Q Were you in a position so she could see you?
A I don't know.
Q Well, why did she go back in the room?
A Because I told her to go back in the room.
Q Oh, you told her to go back? He didn't tell her to go back?
A He told me to tell her to go back into the room.
Q But he didn't see her?
A Or he would kill her first.
Q He didn't see her?
A He did.
Q He did see her, then?
A Yes.
Q And she saw him?
A I suppose she did.
Q Well, she saw both of you, didn't she?
A I suppose she did.
Q So that, then, after you left there, she knew what had happened?
A I don't know. I can't say.
[fol. 71] Q When did you next see her?
A See my daughter?
Q Yes?
A After the attack, and I came back home.
Q And she was still at home?
A She was in the back room where I told her to go.
Q She was still there?
A Yes.

Q How long did it take you from the time that you told her to go to the back room until you got back?

A I can only approximate the time. I am not sure.

Q Well, you can guess, can't you?

A I say I can only approximate the time.

Q How far was that—how far was that from—approximately—to the hospital where you work?

A About two blocks.

Q That was—Meharry was closest from that—from the point of attack than the grocery store to which you went?

A No. It was not. I went to White Lunch Room, and it's about three or four doors down—in fact, it's two doors down from where I was—my house.

Q That's just up the street? (goes to blackboard) You say the attack occurred up here?

[fol. 72] A That's correct.

Q And would you come down and show me where White's place is?

THE COURT: Come down, and show him where White's Place is.

(witness goes to board)

THE COURT: Draw an "X" on the board where it is.

A Is this what you wanted?

MR. LOOBY: Now, make an "X" where your house is.

A (draws on the board)

Q And you lived right here? And the market was down here at White's Place?

A Yes, sir.

Q Where did you go from White's Place?

A I went back to the house to stay with my children.

Q And then you went to the hospital after that?

A I went to the hospital—

Q Yes?

A —after the police came.

Q I see.

THE COURT: Come back and take the witness stand.

(Witness comes back to the stand)

MR. LOOBY: Now, let's get back to this—you saw the picture in the morning, didn't you? you saw the papers [fol.73] in the morning there? You saw the morning paper with the picture in it in the morning?

A That's right.

Q And in the afternoon you went to the police station, and identified this defendant?

A No. I went that afternoon before the picture was in the paper.

Q And they had his picture in there?

A No, there was no write-up the afternoon I went to identify him.

Q Well, when you went from this place to the house—now, just a minute before you get to that—police came to your house that afternoon and you went to the hospital?

A When the attack occurred?

Q And they told you then they wanted you to come—

A Just a minute—

Q Police came to your house, and they told you there that they wanted you to come to the police station to identify him, didn't they?

A Yes, sir.

Q Well, you testified at the juvenile court, didn't you?

A Yes, I did.

Q And your testimony, then, was true? Isn't it?

A Yes, sir.

[fol. 74] Q All right. Now, you testified in juvenile court that police came and told you they wanted you to come to police station to identify the suspect, and they took you, and showed him to you up here? Didn't you testify to that?

A Pointed him out to me?

Q Yes?

A They brought the suspect.

Q Huh?

A I identified the suspect. They didn't point him out.

Q But they took you and showed him to you?

A That is correct.

Q I see. And that was the second time you were allowed to see him?

A That is correct.

Q How many of them were there when they pointed him out to you?

A He was the only one.

Q And they came to your house. You had already reported that you had been raped and that was in January,and in August they came to your house and told you they had a suspect, and they wanted you to identify him, and you went and identified him? That's what I mean.

A That wasn'tthe first time I had been down to look at the suspect.

[fol. 75] Q I didn't ask you that. This happened in January?

A That's right.

Q You had not seen the man since—from that time on?

A That is correct.

Q Until sometime in August police came and told you they had a man down there they wanted you to come down and to identify?

A That's right.

Q And you went down there?

A (hesitates)

Q And identified him?

A Yes, sir.

Q Another thing, Mrs. Beamer, how long have you lived in that neighborhood?

A I've lived in the neighborhood about nine years.

Q Do you know where Mr. Galloway lives?

A Mr. who?

Q Galloway.

A Ganaway?

Q Galloway. Alfred Galloway.

A No, I don't.

Q Well, did you have to cross a trestle? that night [fol. 76] of January the 22nd? Did you have to cross a trestle?

A Did I cross a trestle?

Q Cross it? Yes?

A Yes, I did.

Q You went over this trestle? and this Defendant was behind you all of the time?

A Yes, sir.

Q Had a knife holding it on you all of the time?

A Yes, sir.

Q Had a knife out holding it all the time?

A Yes, sir.

Q Do you know how long it took you from the time you left your house until you returned?

A I am not sure about the time element. It seemed—

Q Approximately?

A Well, it probably seemed longer than it was.

Q Well?

A Till I come back. Well, it might have been about 15 or 20 minutes, maybe a half an hour.

Q Maybe half an hour? And your daughter stayed in the house all this time waiting for you?

A Yes.

Q Now, how were you dressed that night?

A I had on slacks, and a sleeveless blouse.

[fol. 77] Q You had on slacks, that is, pants slacks?

A That's correct.

Q And did you have to take them off, then?

A Yes, sir.

Q And you did take them off?

A Yes, sir.

Q Now, January 22nd, undoubtedly,—that's a winter month—mid-winter—it would be cold that night? wasn't it?

A No, it was not a cold night.

Q It was a warm night in January?

A It was a warm night. Earlier it was a warm day.

Q It was a warm day—but I am talking about that night? Was it a warm night?

A It was a warm night, up until after I got back from uptown—down here—it started raining, and turned cool.

Q You never wore an overcoat during all that?

A I had a coat when I went to the hospital, but when he ordered me out of the house, no coat, I came out just like I was dressed.

Q Does your husband work at night or day?
A My husband works in the day.
Q And he's home what time?
A Oh, he's home around 4:30 or 5:00.
[fol. 78] Q And he usually stays out at night?
A No, he had been going to law school from night on Friday night and Monday night.
Q He had been going to law school on Friday night. And he went to law school that Friday night?
A He left out about—he didn't go to school that night—to class that night.
Q What happened?
A However, he—he left to get a book around 9:00 o'clock.
Q 9:00? Did I understand you to say—I have been kind of very rambling, I know—did I understand you took off your panties as well as your slacks?
A That is correct.
Q You had plenty of time, then, that night?
A Plenty of time?
Q Yes?
A No.
Q But you had to take off your slacks?
A It didn't take but a second to pull down panties and slacks.
Q You just pulled them down? Did you pull them down yourself? or did he pull them down?
A No, he told me to pull them down.
Q And you pulled them down? You were quite obedient to him, weren't you?
[fol. 79] GEN. HOLLINS: Object to that.
A I—uh—
GEN. HOLLINS: It's not proper.
THE COURT: That's a proper—
GEN. HOLLINS: It's a statement—
THE COURT: —question.
GEN. HOLLINS: —It's a statement, You were quite obedient,—that's got no place in this lawsuit.
THE COURT: Well—
GEN. HOLLINS: It's that statement I object to.

THE COURT: Overrule your objection. It's cross examination. He said, You were quite obedient to him. She can answer She can answer and explain any action she took. Were you obedient to him?

A Sure I was obedient.

THE COURT: And if so, why?

A With him over me with a butcher knife, and a big man like that. You would be obedient, too.

MR. LOOBY: Was he standing over you with a butcher knife, then?

A Yes, he had the butcher knife.

Q Where did he have the butcher knife?

A In the front of me. Facing me.

Q And you were laying down? Weren't you?

A I was laying down after I pulled off the panties as [fol. 80] he told me to do.

Q Were those the pieces of clothing you pulled down? took off?

A The lower part.

Q The lower part? Did you take off the upper part?

A No.

Q Now, you say,—did he—did he—did he lay down on you?

A Yes, he did.

Q So that you were cheek to cheek?

A That's correct.

Q Now,—and all that took about 15 minutes? How long have you been a licensed practical nurse?

A I have been a licensed practical nurse for 15 years.

Q For how long?

A 15 years.

Q And you handle men patients, don't you?

A No, I work on the maternity ward. I work OB.

Q And you've worked all 7 years? on this?

A All 15 years I have worked on OB service.

Q OB Service?

A That's correct.

Q And in all your training, you didn't work with [fol. 81] men?

A Well, we trained in that year—we had—we worked all the services.

Q I am talking about you, now,—not "we".
A I—
Q Yes?
A —worked a month on each service.
Q You handled male as big as—no, bigger and older than 16 year old boys, haven't you?
A Do I handle?
Q Yes?
A Male?
Q Yes?
A No. I only handle—nurses don't handle patients, male. They have orderlies.
Q I am not asking about what nurses do. I am asking about what you do—
A No, in my duty, I do not handle male patients.
Q Now, following this further about the assault, how was he dressed?
A He had on a short-sleeved green shirt. And as to the type of trousers on, all I can remember, they were dark. I don't know what color.
Q Did he take any of his clothes off?
A He dropped his pants.
[fol. 82] Q He dropped his pants?
A And his shorts. He didn't pull them all the way off. He just dropped them around his knees.
Q And all the time he was doing it, was he using both hands to do all that?
A One hand.
Q It was one hand? And he had the butcher knife in his other hand? He have his—
A That is correct. Yes, sir.
Q He had this knife in his right hand, I presume?
A Yes, sir.
Q Huh?
A Yes, sir.
Q Ma'am?
A Yes, sir.
Q And he did all of that with his left hand?
A Yes, sir.
Q And you, at the same time, were disrobing yourself?
GEN. HOLLINS: Repetitious. We object.

THE COURT: Yes. Sustain the objection being repetitious. She stated that once.

MR. LOOBY: Your Honor please, we except to the Court's ruling, but this part—the question I am asking now is in connection with what he should be doing with [fol. 83] both hands at the same time.

THE COURT: All right.

MR. LOOBY: Now, Mrs. Beamer, can you give this Court and the Jury an estimate of the distance from where the assault occurred to Albion Street?

A (hesitates)

THE COURT: Did you understand his question?

A No, I didn't.

THE COURT: Can you give an estimate of the distance from where the assault occurred to Albion Street? from where—

A Well, I think—

THE COURT: —you said you were assaulted to Albion Street?

A I can say I could see the street light. I am not sure just—I have never been up in that area before, so I really can't estimate how many feet. The only thing I remember I could see the light—street light.

Q Now, Mrs. Beamer, is it true that Meharry is bounded on the south by Albion Street?

A Why, I—

Q And now—

A I may have the street incorrectly named, but it was the second—it was past the street behind Meharry.

Q Well, Meharry is bounded on the south by Albion, isn't it? Meharry is bounded on the south by Albion, on the north by Meharry, on the east by Eastes Avenue, and on the west by 21st Avenue. Did I give those directions correct?

[fol. 84] A Would you repeat that again, please?

Q I said, now—Isn't it true that Meharry School and Hubbard Hospital is bounded on the east by Eastes Avenue, and on the west by 21st Avenue, North, on the north by Meharry Boulevard, and on the south by Albion Street?

A I believe you are correct. I have my streets directions labeled wrong.

Q You have yours drawn wrong?

A As I said the streets. I may have the streets incorrect. I had Albion down there first and changed it. I get Albion and Almeda confused, in name.

THE COURT: In other words, you say that you may have Albion and Almeda—

A Albion and Almeda—

Q —reversed?

A Got it reversed on the chart.

GEN. HOLLINS: I object to this. It is not proper. One is—

THE COURT: Never mind. Go ahead.

GEN. HOLLINS: (talks very loudly and not understandable on the record)

THE COURT: Never mind, Gentlemen. Go ahead, Mr. Looby. Go ahead.

MR. LOOBY: Now, the top of this map is what direction? What part is this? As you have it, the top of the map is what direction?

[fol. 85] THE COURT: Did you understand him?

A No, I didn't.

THE COURT: The top of the map represents, in your opinion, east, west, north, south?

A The top represents south.

THE COURT: The top represents south?

A And the bottom represents north. This side represents west—I mean east, and that side west.

THE COURT: North and south, Mr. Looby. Top and bottom.

MR. LOOBY: She says north?

THE COURT: No, she says south at the top.

MR. LOOBY: Well, now—

THE COURT: And she states that she may have Almeda and Albion streets reversed. She doesn't know for sure. Isn't that what you stated a moment ago? I want to be sure I understood you.

A That's correct.

THE COURT: I want to be sure I understood you correctly.

MR. LOOBY: And the basis of your mark as designated as where this occurrence happened may be incorrect?

GEN. HOLLINS: I didn't understand that question.

THE COURT: Restate your question, Mr. Looby.

MR. LOOBY: And you say this map is right or wrong?

A No, that is correct. Almeda to Albion. That's correct.

[fol. 86] MR. LOOBY: Would you say that again?

THE COURT: Now, are you saying now that the map —the diagram you have on the board is correct?

A That's correct.

THE COURT: You are going to have to speak a little louder. Tell him what you said. Speak up louder.

A I said I have it correct. Almeda is the next street behind Meharry, going south, then Albion is the second street, and it's in between Almeda and Albion, and down off the track in this overgrowth where this occurred.

MR. LOOBY: Well, now,the location of Meharry Medical College is incorrect, then, isn't it?

A No.

Q Well, now, let's see—will you show me where Meharry Medical College is on this diagram?

GEN. HOLLINS: That's repetitious, too.

A Actually, the map—this blackboard is so small I couldn't put it up the street by—farther up there would be, but it is to the east of where I live.

MR. LOOBY: What is?

A Meharry is to the east, I live further down to the west. Going west on Meharry.

Q But is this about the point where the incident occurred?

A To my best estimate. I have never been back to the same—to that spot again.

[fol. 87] Q You are just going from your memory—from the time the incident happened?

A I am going from my memory of January the 22nd. That's correct.

Q And you have never seen that spot again?

A No, I haven't.

Q Was that spot you testified about very far from where you live?

A It may not even be two city blocks. In fact, I don't even think it is two city blocks—about one city block.

Q Now,the first contact you had with this man, how did you say he assaulted or grabbed you? He grabbed you by the back, I understand.

GEN. HOLLINS: I'm sorry, but I didn't get Mr. Looby's question.

THE COURT: Restate your question, Mr. Looby.

MR. LOOBY: I want the witness to hear it. Well, now, the first contact you had with this man, how did you say he assaulted or grabbed you?

A He grabbed me from behind.

Q What part of your body?

A Around my neck.

Q Were you—in what part of the house were you then?

A Coming out of the living room in the hall, to go [fol. 88] into my bedroom.

Q Was that light lighted there?

A The living room was lighted.

Q So you—but you couldn't see because you were in the rear?

A The kitchen was not lighted.

Q The kitchen was not lighted?

A No.

Q Where were you when he knocked you down? Or did he knock you down?

A Right in the kitchen in the doorway, where he grabbed me.

Q And that—

A When he grabbed me from behind, and grappled—twisted me on the floor. Threw me down on the floor.

Q And there was no light in that kitchen?

A Not in the kitchen.

Q So you couldn't have seen him then?

A Yes, I could see him, when I looked up in his face.

Q In the dark?

A He was right in the doorway—it was enough light from the bedroom shining through. Yes, I could see who he was.

Q You could see? No light? And you could see him [fol. 89] and know him, then?

A Yes.

Q Now, then he marched you on through the hall?—I understand—Was there a light in the hall?

A He didn't march me through the hall. He had me to go back out the kitchen door.

Q Oh. I see. Uh—

A Never went to the front.

Q And then you got out in the light? You say there was no light in the kitchen? And then you got out in the light?

A Light from a bright moon, and light from the—

Q Was the moon what was shining in your house? Was it?

A The light from the bedroom and the living room was on in my house.

Q Are you sure you could see all the way?

A Beg pardon?

Q Are you sure you could see all the way from there on?

A Yes.

Q Now, when you got out, the moon was shining brightly, full moon?

A Yes, sir.

Q And you saw nobody whatsoever?

[fol. 90] A No, sir.

Q And that was about 9:00 o'clock at night?

A Yes, sir.

Q Are there some street lights around there?

A Yes, sir.

Q You are talking about those brights—

A Neon lights.

Q Ben West Lights.

A Yes, sir.

Q And you saw nobody—you saw nobody, and nobody saw you?

A No,sir.

Q And that was about 9:00 o'clock at night?

A May I mention one thing?

Q Yes, mention anything cause the more you have mentioned, the more we find out—

A Almeda Street, at that time, was torn up. That's another thing. They were putting in new water pipes. And nobody—

Q Where was this?

A On Almeda.

THE COURT: Go ahead. Nobody what?

A And cars—traffic was blocked, between 21st and—is that 24th? Yeah, between 21st and 24th on Almeda, no cars could pass, because it was all plowed up.

[fol. 91] Q But you passed?

A When I passed?

Q But you passed?

A That's correct. Yes, sir.

Q And you passed right by a house—some houses, didn't you?

A No, I didn't pass by a house—cause I was on the railroad track, and there's no houses on the railroad track.

Q You were fully clothed then?

A (hesitates)

Q Had your shoes on?

A Well, slides—just what I wore around the house.

Q You had—you had shoes on?

THE COURT: It's slides.

A Just slides. Uh—just little shoes I slip my feet in.

Q And you were going through that torn-up—

A No, we didn't go through that torn-up area. See, he carried me up on the track, and the track went up over the torn-up area.

Q But you were on—

A No street went—we didn't walk on any street at all. No street.

[fol. 92] Q That's an overhead—over—overhead trestle isn't it? That's over the street. That doesn't cross the street—it's an overhead trestle?

A The whole railroad is overhead.

THE COURT: Yes, she's testified to it. Let's move along.

MR. LOOBY: Why didn't you scream?

A I didn't see anyone.

Q Do you have to see someone to scream?

A That is correct. If everybody—at that time of night, I seen no one, everbody had their doors closed, and people have been known to scream, and see people, and never come out, so I wasn't—

Q Is that—

A —taking any chances.

Q Is that the reason why—

A And he told me, Don't holler—

Q And that was at 9:00 o'clock? at night?

A Yes, sir.

Q You may ask.

THE COURT: Is that all, Mr. Looby?

MR. LOOBY: Yes, sir.

THE COURT: You may come down.

GEN. HOLLINS: Hold on just a minute.

THE COURT: All right. Is that all?

MR. LOOBY: Yes, sir, unless it is something that [fol. 93] hasn't been brought out.

THE COURT: All right, go ahead, General.

REDIRECT EXAMINATION

BY GEN. HOLLINS:

Q Mrs. Beamer, Mr. Looby has asked you about taking off your own underclothing, and pulling your own britches down, what was the Defendant doing while you were doing that?

A He was standing up with the knife. He let me pull —made me pull my clothing down first, then he dropped his pants.

Q All right. And he asked you about not seeing anybody. Did you go out your front door? or back door?

A We went out the back door.

Q And where did you straight—when you went out the back door?

A Straight—straight down through my drive out to the alley and right up on top of the track.

Q Did you ever go anywhere-where people were?

A No.

Q Now, he asked you about screaming. What, if anything, had the Defendant told you about screaming?

A When I was screaming, he told me to Shut up, or he'd kill me.

Q That's all.

[fol. 94] RECROSS EXAMINATION

BY MR. LOOBY:

Q But you did scream?

A I was screaming when he grabbed me, but I stopped screaming after he told me that.

Q So you were screaming when your daughter came in, then?

A In the house. My daughter didn't come in. She opened the door.

Q But you were screaming when she came in?

A She didn't come in.

Q. But you were screaming when she opened the door?

A That's correct.

Q So she knew something was wrong, then?

A Yes. Yes, sir.

GEN. HOLLINS: Now, Mr. Williams is participating in this, speaking too loudly.

THE COURT: Yes, General. Mr. Williams, I will have to instruct you that Mr. Looby is conducting the Cross Examination. Go ahead, please.

MR. LOOBY: Your Honor please, he is communicating with me.

THE COURT: Well, he can't talk out loud enough so that the Jury can hear. I have so instructed you, Mr. Williams, that you not do it.

[fol. 95] MR. WILLIAMS: May it please the Court, I take it I can consult with my co-counsel?

THE COURT: You can. But I instruct you not to raise your voice to the extent that the Jury can hear the statements you are making to Mr. Looby. If so, I am going to apply the Rule that he will conduct the lawsuit.

MR. LOOBY: So, at the time that you left, or were taken away by this Defendant, or whoever assaulted you, your daughter was there and apprised of the situation in which you were?

A No, she wasn't aware of what was happening.
Q She didn't know what was happening?
A As I forestated I told her to go back in the room, and close the door.
Q And that was because this man had told you to tell her that?
A He told me to do—to tellher to go back in the room.
Q That's all.
THE COURT: That's all. you may come down and have a seat by the district Attorney, please.
Further this witness testified not.

* * * *

THE COURT: Your next witness, please.
GEN. HOLLINS: John Smith.
THE COURT: John Smith, please.

[fol. 96] JOHN SMITH, called as a witness on behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY GEN. HOLLINS:

Q Mr. Smith, will you give us your full name, please.
A John W. Smith, Jr.
Q Where are you employed, Mr. Smith?
A Metro Police Department. Detective Division.
Q Where?
A Detective Division.
Q Were you so employed back in January this year?
A Yes, sir.
Q Did you, yourself, handle the initial call on this case?
A I don't answer initial calls.
Q When did you get into the case?
A Uh—two days after the initial call was made, sir.
Q In the course of your work, did you have occasion at any time to visit the Beamer home?
A I did.
Q What was the purpose of your going there?
A Let her view some photographs we had to see could

[fol. 97] she pick out a suspect that we had in mind, but she failed to do so.

Q Well, about how many—was few photographs? or many photographs?

A About 30 or 40.

MR. WILLIAMS: May it please the Court, I don—I fail to see the relevancy of this.

THE COURT: Well, the State will have to tie it in and make it relevant. So far—go ahead.

GEN. HOLLINS: Who was with you on this case?

A Officer Berry.

Q Did you, yourself, ever take anyone else out to the home?

A Just Officer Berry and I.

Q All right. Were you, yourself, present when she identified any person, at any time?

A Yes, sir.

Q When? when was that?

A That was about the 16th day of August. I had orders to pick up Mrs. Beamer to bring her to headquarters. She identified a suspect that we had at headquarters.

Q And who was with you on that occasion, if anyone?

A Officer Berry.

Q Did you bring her to headquarters?

[fol. 98] A Correct. I did.

Q Who, if anybody else, was there at headquarters?

A Several officers were there—Lt. McDaniel, Officer Cathey, Officer Bass,—was there.

Q Was the Defendant there, or not?

A He was there.

Q Were you present when she made any identification of anyone?

A I was there.

Q Who, if anyone, did she identify?

A She identified Mr. Biggers.

Q Well, was she hesitant about it? or positive about it?

MR. WILLIAMS: We object to it, if your Honor please.

THE COURT: Yes. Rephrase your question. Let him testify as to the manner in which she identified him.

GEN. HOLLINS: Can you give us the manner in which she identified him?

A Yes, sir. Mr. Biggers was sitting in the room and they had Mr. Beamer go by this room. Just pass by and look at this Defendant. And she did. And she said, That is the man.

Q And did the Defendant ever talk, that you know?

A No, sir. Never talked.

Q You don't—

A I never did hear him say anything.

[fol. 99] Q Your witness.

CROSS EXAMINATION

BY MR. LOOBY:

Q Mr. Smith—

A Yes, sir.

Q Your Honor, is it all right if I retain my seat?

THE COURT: If—

A I didn't understand you, sir.

THE COURT: If you can, Mr. Looby, I'd like for you to rise. I realize your situation.

MR. LOOBY: Mr. Smith, you are—how long have you been on the police force?

A Seventeen and a half years.

Q You are now a detective?

A Yes, sir. I'm a detective now.

Q I'll ask you whether or not when you went out to Mrs. Beamer's place the second time, or this time in August, did you tell her you had a suspect that you wanted her to identify?

A I said—I see—

Q Did you or did you not?

A I told her we had a suspect that we would like her to look at and see if she could identify him.

Q Yes?

A That's right.

[fol. 100] Q And so you took her down and pointed out this man to her?

A That's right.

Q And she identified him then? Now, I will ask you, Mr. Smith, don't you know that the day before or that morning—whether it was afternoon or morning that you took her—

A It was in the day. I don't know exactly what time of day, but it was in the day.

Q Well, don't you know that before that time that the picture of this Defendant appeared in the newspaper?

A No, I didn't know that, sir.

Q Well, you know the picture did appear?

A I know that. I know it did appear.

Q And it was the day before—

A That's right.

Q —she went up? You say, That's right?

A That's right.

Q That's all I wanted to ask. Now, you say, That's right. I want to be sure that we understand what we are saying. Uh—our position is that before you took her down that the picture of this Defendant appeared in the newspaper, on the front page of the morning paper.

A It could have, sir.

Q Yes?

[fol. 101] A It could have.

Q Well, after that had appeared, you went out there and got her, and brought her down to the station to see if she could identify this man?

A Correct.

Q And she did identify him?

A Correct.

Q That is after the picture had been in the paper?

A That's right. That's right.

Q Thank you, Mr. Smith.

REDIRECT EXAMINATION

BY GEN. HOLLINS:

Q Mr. Smith, do you know whether the picture ever appeared in the paper? did you ever—

MR. LOOBY: It did appear in the paper. That is part of his testimony. That is already—

GEN. HOLLINS: All right, let's put it this way. Did you ever see the picture in the newspaper?

A I did later on that day, but not before I had carried her to headquarters.

Q Do you actually know what day the picture appeared in the paper?

A No.

[fol. 102] Q That's all.

THE COURT: Any further questions?

MR. LOOBY: I submit, your Honor please, that the State should not be allowed to cross examine its own witness.

THE COURT: I do not—I think it's a proper question, Mr. Looby, and overrule your objection, and note an exception.

Do you have any further questions?

MR. LOOBY: We note an exception.

THE COURT: Do you have any further questions, General?

GEN. HOLLINS: No, sir.

THE COURT: You may come down and have a seat in the courtroom, Mr. Smith.

Further this witness testified not.

* * * *

(Gen. Hollins asks for about a five-minute recess)

THE COURT: Yes, I think it would be proper, Gentlemen. We will—Members of the Jury, you will return to the Jury Assembly Room with the Court Officers, Mr. Steele and Mr. Griggs. Gentlemen, we will take a very short recess. Wait until the Jury steps out, please. Be seated.

(Jury leaves the courtroom)

THE COURT: Now, Gentlemen, the Court would anticipate that we would go to 5:00 or 5:30, Gentlemen, no longer than 5:30, so you can arrange your witnesses accordingly, General. So you can have some idea, Gentlemen, we will go till around 5:30.

[fol. 103] (short recess is had)

THE COURT: Next witness, please.

GEN. HOLLINS: Mr. Black.

RAYMOND A. BLACK, called as a witness on behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY GEN. HOLLINS:

Q Would you give us your full name, please.
A Raymond A. Black.
Q Mr. Black, where are you employed?
A Metropolitan Police Department.
Q What's your job there?
A Patrolman.
Q Were you so employed back in January on the 22nd?
A I was, sir.
Q Did you have occasion to investigate this matter we are concerned with here today?
A Well, I made the initial call on it.
Q All right, sir. Where were you when you got the call?
A Well—
Q If you remember?
[fol. 104] A I don't exactly remember.
Q Were you in a car? or were you somewhere other than that?
A Other than a car.
Q Where did you go?
A Went to—uh—2319 Meharry.
Q What did you find when you got there?
A Well, after we made this call there, we found Mrs. Beamer.
Q Yes, sir?
A She claimed that she had been raped.
MR. LOOBY: We object to that, if your Honor please.
THE COURT: No, don't tell—
GEN. HOLLINS: You won't be able to tell what she told you.
A Yeah, well, we found Mrs. Beamer there.
Q And what did you do, then, after you found Mrs. Beamer?
A Well, she made a complaint to us.

Q And what did you do after she had made her complaint?

A Well, after she made her complaint, we called in and then gave out some information over the air, searched the area around the house.

Q Were you able to find anyone?

A No, sir.

[fol. 105] Q Then, what, if anything,did you do?

A Well, we—after that, we carried Mrs. Beamer to the hospital.

Q What hospital was that?

A That was Meharry,—or Hubbard.

Q And were you met there by anybody?

A No, sir.

Q Why did you—what was your purpose in carrying her over there?

A Well, she claimed she had been raped.

Q And why were you carrying her to the hospital?

A Well, that's normal procedure, in a case like that.

Q Now, after that, did you have occasion to go back to Mrs. Beamer's home on any occasion? on any other occasion?

A One occasion.

Q And what was that for?

A Well, that—

Q Yes, sir? When was it? Do you know when?

A I don't recall exactly when.

Q About—approximately how long after this offense?

A Uh—it was quite some time. Just how long, I don't know.

Q Did you go by yourself? or did somebody do with you?

[fol. 106] A I don't remember that.

Q And do you remember what the reason was for going?

A Well, it was concerning the case that she had the report that she had gave us.

Q Well, did you take anything with you when you went there?

A Not that I know of.

Q And, on the second occasion, did you just have further conversation with her?

A (hesitates)

Q Of course you won't be able to relate what the conversation was.

A No, sir.

Q Is that the extent of your investigation about this case?

A Yes, sir.

Q And the reason we put you on this afternoon is you have been up all night? is that right?

A Yes, sir.

THE COURT: Cross examine?

MR. LOOBY: No questions.

THE COURT: You may come down. You may be excused. Thank you.

Further this witness testified not.

[fol. 107]

* * * * *

THE COURT: Your next witness, please.

GEN. HOLLINS: Call Mr. Cathey.

THOMAS E. CATHEY, called as a witness on behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY GEN. HOLLINS:

Q Will you give us your full name, please, sir?

A Thomas E. Cathey.

Q Where are you employed, Mr. Cathey?

A Metropolitan Police Department.

Q In what division?

A Homicide Division.

Q Were you so employed back on January 22nd of this year?

A I was, sir.

Q In that capacity, did you have occasion to investigate this case?

A Yes, sir.

Q Did you, in the course of your investigation, ever see this Defendant, Mr. Biggers?

A No, sir. In the course of my investigation, Gen-

[fol. 108] eral?

Q Yes, sir?

A Yes, sir, I did, sir.

Q And on what date—when was the first time you saw him?

A The first day that I saw Nathaniel Biggers was on August the 16th, 1965. Now, General, if I may, this was near midnight, and it could have been very early on the 17th, sir.

Q Where was he at that time?

A He was at—on Cliff Drive.

Q Did you have occasion to see him at any other time on that day?

A Yes, sir, I had been working 30 hours, or more, and when we left Cliff Drive, we went to Juvenile Court, and we stayed out there for some time, and I came back to the Homicide office, and later on in the morning, which would have been on the 17th, I went back to Juvenile and we came to the Police Department.

Q At any time that day were photographs made of you or the Defendant in your presence?

A On the 17th?

Q Yes, sir?

A Yes, sir, they were made.

Q And who made 'em?

A General,—uh—

[fol. 109] Q Well, what—

MR. LOOBY: Now, your Honor, please, unless he is going to tie this up with this case, I make an objection—

THE COURT: You are right about that. We will see whether he can make it relevant, or not.

GEN. HOLLINS: Yes, sir.

MR. LOOBY: Sir?

THE COURT: I say you are right, to this extent, that the State will have to make it relevant. I don't know. Go ahead, General.

GEN. HOLLINS: What—uh—if anything, did he do with them?

MR. WILLIAMS: Your Honor, I object to, not only on the grounds of relevancy, but on the grounds of leading.

THE COURT: Yes, it's a leading question, General. Rephrase your question.

GEN. HOLLINS: Do you know what the photographer did with it?

A Yes, sir. The photographer that was making pictures and also for television statements, I assume they were working for the newspaper,—

Q I don't want you to assume. Do you know what—

A They were employed by the newspaper, General.

Q By what newspaper?

A The Tennessean.

Q Did you, at any later time, see the picture that had been made then, of Mr. Biggers, when you were present? [fol. 110] A The first time I saw a picture of the Defendant was the next morning, which would have been on the 18th.

Q And where did you see it?

A Uh—when I got up and went to the mailbox and got the newspaper.

Q Well, what newspaper did you get?

A The Tennessean.

MR. WILLIAMS: Of course that is objected to, if the Court please. He is now testifying in regard to a document, and the document itself is the best evidence.

(further words are heard but not understood on the tape)

THE COURT: Never mind. I overrule your objection, at this time, and note an exception to the Court's ruling. Go ahead, General.

GEN. HOLLINS: All right, sir. Now, on the 11th—

THE COURT: Was this on the morning of August the 18th, did you say?

A Yes, sir, the—

THE COURT: All right. Go ahead.

GEN. HOLLINS: On the 17th, at any time, did you have occasion to see Mrs. Beamer? at any time? this lady right here?

A The prosecutrix?

Q Yes, sir?

A Yes, sir, on the morning of the 17th.

Q Where did you see her?

[fol. 111] Q On the 17th?

A She was at the Homicide Office.

Q And who else was there, if anyone?

A Lt. McDaniel, Detective John Smith,—there was quite a few officers up there—

Q Where was this Defendant at that time? Mr. Biggers?

A The Defendant, at that time, General Hollins, was more or less in my custody and we—he was also upstairs in the Detective Division.

Q Were you, yourself, present at any time when anyone attempted to make an identification of Mr. Biggers?

A Well, I was in and out of the room, General. I can not say—as far as being there.

Q Who else was in the room?

A Lt. McDaniel.

Q Now, in the course of your investigation of this case, tell us what, if anything else, you did?

A General Hollins, if I may—in this investigation on this particular case, sir, I would like to clarify this.

Q Yes, sir.

A Or the—

THE COURT: We are only concerned about this case on trial today.

A On this particular case, on January the 22nd, 1965, I received a call from Hubbard Hospital of 1043, which [fol. 112] is an investigation. I arrived there at approximately—

MR. WILLIAMS: May the Court please, your Honor, if he—

THE COURT: Yes, sir.

MR. WILLIAMS: I have a matter to discuss with your Honor now.

THE COURT: Yes. Members of the Jury, you will step out with the officers, outside the courtroom.

(Jury leaves the courtroom)

MR. WILLIAMS: May it please the Court, comes the Defendant, at this time, and respectfuly moves the Court to declare a mistrial in this case, and discharge the Jury, on the ground of the deliberate, calculated, vicious attempt on the part of the prosecution and this particular officer to inject into this case and into the minds of the Jury the idea that there is more than one offense with which this Defendant is charged. We took the greatest care to try to select a Jury which would be impartial, and which knew nothing.

GEN. HOLLINS: May I inquire—

THE COURT: Yes, sir?

GEN. HOLLINS: May I inquire, if your Honor please, may I ask the Court if a question was asked as to any other offenses?

MR. WILLIAMS: Well, may it please the Court, he has had ample time to discuss this with this police officer, and this officer knew, and knows that there is only one case that we have here on trial, and we respectfully sub- [fol. 113] mit that this officer by continually referring to his notes, and repeatedly talking about which case are you talking about, or suggesting that there is more than one case, and referring to this particular case, was deliberately attempting to obtain by innuendo what he could not obtain by evidence.

We respectfully move the Court for a mistrial.

GEN. HOLLINS: Let me be heard just a little bit, may it please the Court. This is a deliberate attack on my integrity, which I strongly resent from my good friend, Mr. Avon Williams; I have asked no questions nor have I been intending to ask this officer if there were more cases on hand. As it is, I presented this case my way, and one question probably gave this answer, and it is not so, Mr. Williams, and I demand an apology.

THE COURT: Well, never mind. The Court will overrule your motion for a mistrial, and note an exception to the Court's ruling.

Bring the Jury back, please.

MR. LOOBY: Your Honor, please, just before the Jury is brought back, we want you to instruct—to advise the witness as well as the District Attorney that to concentrate on just this case, and this case alone.

GEN. HOLLINS: The District Attorney has asked no question about any other case.

THE COURT: Never mind, General. I think the question is in order, and your motion for mistrial is overruled, [fol. 114] and an exception to the Court's ruling is noted.

Bring the Jury back, please.

(The Jury comes back in the courtroom)

THE COURT: Continue with your examination, please.

GEN. HOLLINS: Mr. Cathey, I believe you had stated that you received a call from the Hubbard Hospital?

A Correct, General.

Q What did you find after you got there, other than what anyone told you?

A The prosecutrix was there, General Hollins.

Q Who else was there? if anyone?

A Officer Black was there, General.

Q And what was the purpose of the prosecutrix being there?

THE COURT: If you know?

GEN. HOLLINS: Did you know?

A The—I was called out there for the investigation of a complaint that she had been raped.

Q What, if anything else, did you do in the course of your investigation?

A We had the Plaintiff to go to the Homicide Office and give a statement, as to what had happened, and, also, we got a description, as best she could describe the subject, and it was taken down; also,—uh—the section where the offense occurred, and the weapon that was used, if any.

[fol. 115] Q Did you ever, at any later date, have occasion to go to her home, or to bring her up to headquarters?

A I have been over to the prosecutrix' home two or three times. I know that one time she wasn't at home, but I have been over there, yes, sir.

Q What was your purpose in going?

A To take pictures to show the prosecutrix and see if she could identify them.

Q Well, did you take a few pictures? or many pictures?

A We took many pictures.

Q Was she able to identify any?

MR. WILLIAMS: That is objected to as being incompetent, if your Honor please, immaterial and irrelevant.

THE COURT: Overrule your objection and note an exception to the Court's ruling.

MR. WILLIAMS: May it please the Court, I would respectfully like to call the Court's attention to the fact that his question calls for a conclusion on the part of the witness as to what the prosecutrix was able to do, and he, obviously, could not know what she was able to do.

THE COURT: I think it's a proper question, Mr. Williams, and the Court will overrule your objection and note an exception to the Court's ruling.

GEN. HOLLINS: Mr. Cathey, did you show her a picture of Mr. Biggers?

[fol. 116] A No, we did not.

Q Your witness.

CROSS EXAMINATION

BY MR. LOOBY:

Q Mr. Cathey, I believe it is? Mr. Cathey, I believe it is?

A Yes, sir.

Q When did you first see this Defendant Biggers?

A I first saw Nathaniel Biggers on August the 16th, 1965—

Q Where?

A or—I haven't finished, Counselor—it was late, almost midnight, or it could have been in the very early hours of August the 17th.

Q Where?

A I saw him over on Cliff Drive. This is in Bordeaux.

Q Well, where was he first arrested?

A He was arrested approximately 1:30 a.m., on the 17th. In other words, we took him to Juvenile Aid?

Q You took him to Juvenile Aid?

A That's correct, Counselor.

Q And what did you do with him, then?

A We—uh—Officer Earl Hamm and I—we took him [fol. 117] to Juvenile Aid, and we talked with him, his mother came out there later on, and we advised him of his rights in front of his mother, and we were just talking about the case in general.

Q Well, what did you do with him, then?

A What did we do with him?

Q Yes, yes, yes.

A I don't understand your question, Counselor.

THE COURT: What did you do with him at Juvenile Aid? is the question.

MR. LOOBY: Did you leave him there?

A Yes, sir, he was left there overnight, Counselor.

Q Well, when did you send next to get him? When did you get him down to the police station?

A And I worked—I worked all of that night, and the next morning Lt. McDaniel sent Officer Hamm and I back to Juvenile Aid and we transported—

Q Now, you don't know? Did he—

THE COURT: He is answering it, Mr. Looby. Go ahead. He is saying the next day Lt. McDaniel sent him out—and what else did you say?

A And Mr. Harold Hamm and I went to Juvenile Aid and transported Mr. Biggers to the Homicide Division.

Q by MR. LOOBY: By what authority?

A By what authority?

[fol. 118] Q Yes?

A Well, we had papers that he was ruled incorrigible which they signed out there, so they could—

Q Signed by whom?

A The people at Juvenile Aid.

Q Where are those papers?

A Sir?

Q Where are those papers?

A I presume that they have them over in the jail, Counselor.

Q Uh—did—you are sure of what you are talking about?

A Beg pardon?

Q You are certain of all of that? that happened?

A I am certain that we went out there and brought him to headquarters. Yes, sir, I was there.

Q You didn't arrest him and carry him before Judge Andrew J. Doyle?

A Well, this was later on in the morning, Counselor, on the 17th.

Q At the time that you arrested him, did you have a warrant for his arrest?

A At the time I arrested him?

Q Yes?

A Counselor, I can't answer your question. Uh—I [fol. 119] can't answer your question.

Q I'll ask you this, then: without the Jury's—

GEN. HOLLINS: Let's let the Jury step out a minute. I have something I want to take up with the Court.

THE COURT: All right, sir. Members of the Jury, you may step out, for a moment.

(The Jury leaves)

GEN. HOLLINS: There's talk in this courtroom of integrity—Mr. Looby knows very well he was arrested on a warrant in another case, first, and it's a little bit difficult in this case to get a mistrial, and that's all that he's trying to do. And I resent that. And Mr. Looby has got a warrant there in front of him.

MR. LOOBY: I don't care what you resent, if your Honor please.

GEN. HOLLINS: He's got a warrant—

MR. LOOBY: I have a warrant here.

GEN. HOLLINS: And that's the reason that Officer Cathey is required to answer your questions.

THE COURT: The officer has a right, in the course of his investigation, if he has information and reason to believe that a felony has been committed, and at the time he took him to the Juvenile Court, he wasn't required to have a warrant.

MR. LOOBY: If your Honor please, it isn't the warrant—If your Honor please—

THE COURT: What is the question, then? Mr. Looby? [fol. 120] you have the warrant.

MR. LOOBY: If your Honor please, I questioned him about the warrant for it is my purpose to show and to show by this officer that there has been bungling and everything else in this case, and that it seems to me, your Honor, please, that it has been a decisive plan to trap this boy someway.

Now, the law provides, your Honor, please,—and I didn't make it—that when he is arrested—when a child under the age of 17 years be arrested—is arrested, with or without a warrant, or upon a capias or paper issued for any criminal court, such a child shall in such be taken before a Justice of the Peace, or Police Magistrate, instead of being held to bail, or incarcerated for his offense within criminal court—

What I am trying to show, your Honor, is that this boy was arrested and carried before the—according to the record—and that's what I'm talking about—was carried on to the police court down there, and he never did have the protection—and, according to a definite pattern of the Police Department, that he never had any of the rights or privileges of protection owed to him by the State and the Constitution, and that's my purpose of my examination. And I am holding the record.

THE COURT: That is the warrant you have there?

MR. LOOBY: Yes, sir.

THE COURT: In this particular case?

MR. LOOBY: Yes, sir, and this is the case I am talk- [fol. 121] ing about.

THE COURT: All right, sir. You can examine him about the warrant. You can ask him if he had a warrant.

MR. LOOBY: Well, that's what I was doing when—

THE COURT: Let's have your examination in the absence of the Jury, and then we'll decide whether or not it's competent.

MR. LOOBY: You see I've got a copy of the (next word is not understandable on the record) that's in the record here?

A I didn't understand you, Counselor.

MR. LOOBY: Uh—Mr. Officer, will you take it?

THE COURT: One of you officers bring the warrant to him over here.

MR. LOOBY: That's a copy of the warrant under which this boy was first arrested and is being prosecuted?

A General, I still don't understand.

GEN. HOLLINS: I think I have a right to see those papers.

A General, I don't understand Counselor's question. I'd like to have time to explain.

THE COURT: Well, as I understood you a moment ago, you stated that you went out to Juvenile Court under the orders of Lt. McDaniel,—you and Officer Hamm—and you picked the Defendant up, that you had papers where he had been declared incorrigible, as I understood that a moment ago.

A Uh—your Honor, may I explain to you, sir?

THE COURT: Yes, sir.

[fol. 122] A On cases such as this, we were sent to Juvenile Aid, and we wanted to talk to the Defendant more. Those people out there gave us papers—in other words, to turn over to our jail. See! And we take those papers, which we did, and we come back, but what Mr. Looby is asking me about, we had him at Juvenile Aid not on this—this case, but on one that happened on Cliff Drive. So, I didn't—I didn't have any—uh—I wouldn't have had him at Juvenile Aid on this case.

MR. LOOBY: Your Honor, please, we only want what is in this case, Mr. Cathey.

A I—I know, but I am trying to explain the reason that he was at Juvenile Aid. He was there for the real—for what happened on Cliff Drive, and we had a positive identification, you see.

Q What do you mean—Juvenile Aid? Where is the Juvenile Aid?

A Juvenile Detention, where—

THE COURT: I think that's a new name for it, now, instead of Juvenile Court. I think they call it Juvenile Aid. Is that right?

A Yes, sir. Juvenile Detention or Juvenile Court.

THE COURT: Juvenile Detention.

MR. LOOBY: It's everything except an aid.

GEN. HOLLINS: May it please the Court, if this offi-

[fol. 123] cer did have the warrant—that he had a warrant at that time—Mr. Looby would get in what he is saying—what he is so vigorously trying to get in—by complaining of the warrant being served.

MR. LOOBY: No, that's not—

THE COURT: Did you have this warrant, yourself, to serve, or execute, on this Defendant?

A Uh—here is—here are the names, your Honor, please,—that would be Sgt. Woods and F. Bailey. Now, Mr. Bailey is back as a witness and Lt. McDaniel—

THE COURT: Then you had no warrant when you brought him from Juvenile Aid back to the Police Station?

A No, sir.

THE COURT: All right.

A The only thing we had are the papers which give us permission to bring him from there, as being an incorrigible, to the jail.

THE COURT: Then you had nothing to do with this warrant?

A No, sir, I did not.

THE COURT: Hand that back to Mr. Looby, please.

(Officer hands back the warrant to Mr. Looby)

THE COURT: And I—I firmly think it would be impossible Gentlemen, to get into the proposition of the investigation he had at Juvenile Court. This officer can testify that he, on orders, went out in the furtherance—in the course of his investigation of the complaint that he [fol. 124] was investigating where this lady is the prosecutrix, that in furtherance of that investigation, he then brought the Defendant back to the Police Station. This officer had nothing to do with the warrant. He didn't execute it, didn't obtain it, or anything. And if I permitted you to get into the other question, we would be getting into exactly what you objected to a moment ago.

MR. LOOBY: Yes, sir. But I—

THE COURT: I think that the State's—

MR. LOOBY: I'm seeking my question—

THE COURT: —objection—

MR. LOOBY: —on the record in this case.

THE COURT: Sir?

MR. LOOBY: This is the warrant here in this case.

THE COURT: Yes, sir? But I—

MR. LOOBY: And I'm seeking my examination solely as to this case, if your Honor please.

MR. WILLIAMS: Your Honor, please—

THE COURT: Well, that's what you'd have to. But it certainly would be limited to this warrant, as to this officer as to that warrant in this particular case.

MR. LOOBY: Yes, sir.

THE COURT: I don't think, Gentlemen, that the Court can permit you to get into the other, because then we'd get into what you objected to a moment ago.

MR. LOOBY: I'm not—I don't want to get into it.

[fol. 125] THE COURT: I'm not going to let you get into it.

MR. LOOBY: I don't want to get into it, your Honor, please.

THE COURT: All right, sir.

A May I have one statement?

THE COURT: Yes, sir.

A Concerning when I asked about this particular investigation, that's what I was referring to, because I was more or less on the investigation on Cliff Drive, and then he was brought up there when this came about, you see.

THE COURT: Well—

GEN. HOLLINS: While we are still on it,—

THE COURT: I am going to limit the examination of this officer to this case, and the testimony and the evidence in this case only.

MR. LOOBY: Yes, sir. And this warrant, that I have in my hand that you examined, has only to do with this case.

THE COURT: That's right.

GEN. HOLLINS: I just want to ask this officer one more question while the Jury is out, for the purpose of the record. Officer Cathey, did I, or did I not, before I put you on the witness stand, caution you about not mentioning other cases? and to confine your testimony to this case?

A That's correct. I mean the other cases were not mentioned at all.

THE COURT: All right, General.

[fol. 126] MR. LOOBY: Mr. Cathey,—

THE COURT: Wait—wait just a minute.

MR. LOOBY: Since the District Attorney advised—warned you, pleaded with you not to bring in any other case, why do you keep referring to the—was it the—case or what?

MR. WILLIAMS: Cliff Drive.

MR. LOOBY: Cliff Drive? Why do you keep on referring to that?

A Because that is where my investigation began, Mr. Looby.

Q But I told you that I didn't want it—that I am not interested in it.

THE COURT: The question, Gentlemen, was, where did you first see this Defendant? and he told him his first encounter with this Defendant was on Cliff Drive. And we got into nothing further than that. And that's as far as you can go, Gentlemen. Let's proceed with the examination on this warrant as to this particular case. Bring the Jury back, please.

MR. LOOBY: As I understand, he says he knows nothing about this warrant?

THE COURT: That's right.

MR. LOOBY: Very well, your Honor.

THE COURT: My understanding.

A Yes, sir, I know nothing about it.

MR. WILLIAMS: I want to tender my—

[fol. 127] MR. LOOBY: Of course—

MR. WILLIAMS: May it—

THE COURT: Yes, sir? Wait just a minute.

MR. WILLIAMS: —please the Court, we again ask for a mistrial. At the time I didn't know the significance of that, but this officer brings it out. I think he testified that the first encounter with this Defendant was on Cliff Drive. Now, he is testifying that some case—some other case that he investigated happened on Cliff Drive. If some—if—it is a fact that is evident that there has been brought into this case the implication of involvement in other cases, on the qualification of some of these jurors, they were permitted to be accepted on this case, although they said that they had read the newspapers, the mention

of Cliff Drive may have brought back to their minds some charge about some other case, that may have been made in the newspapers, and we respectfully submit that this is entirely too serious a matter for the rights of the Defendant in this case, to be treated in the manner that the Police Department has mistreated.

We respectfully move the Court again to renew our motion for mistrial on the basis of this newly disclosed evidence.

THE COURT: The Court will overrule your motion, for mistrial, and note an exception to the Court's ruling.

Bring the Jury in.

(The Jury comes in)

[fol. 128] THE COURT: Questions, Mr. Looby, of this witness?

MR. LOOBY: No, sir.

THE COURT: General?

GEN. HOLLINS: No, sir.

THE COURT: Mr. Cathey, you may come down, sir. Further this witness testified not.

* * * *

THE COURT: Gentlemen, it has now reached the hour of 5:20. We can not conclude this case today. Mr. Officer, you will bring the witnesses in, for both the State and the Defendant.

(witnesses come into the courtroom)

THE COURT: Just come right here and stand. Just stand right in here, please. We are fixing to adjourn court for today. Each of you is instructed to be back in the morning at 9:00 o'clock. Do not discuss this case with anyone under any circumstances, except attorneys for the State and for the Defendant. You may pass on out in the courtroom, please.

The Court will instruct you, under no circumstances, will you discuss this case, and we will now adjourn court until in the morning at 9:00 o'clock. The Jury may retire to the Jury Assembly Room upstairs with the officers, Mr. Steele and Mr. Griggs.

(Court is adjourned for the day)

[fol. 129] FOURTH DAY

December 2, 1965

(The Jury is polled by the Clerk)

THE COURT: All right, Gentlemen, are you ready to proceed? Next witness, please.

GEN. HOLLINS: I'd like to recall Mrs. Beamer.

THE COURT: Come around to the stand, please.

MRS. MARGARET FRANCES WORK BEAMER, being already sworn, is recalled on behalf of the State:

DIRECT EXAMINATION

BY GEN. HOLLINS:

Q Mrs. Beamer, I may have already covered this, but, to be sure, I want you to tell the jury whether or not the Defendant actually penetrated your vagina with his sexual organ.

MR. WILLIAMS: Well, we object to that, if your Honor please.

THE COURT: It's a proper question.

MR. WILLIAMS: It should have gone on *voir dire.*

THE COURT: No, sir, it's a proper question and overrule your objection.

MR. WILLIAMS: Yes, sir. Note our exception.

GEN. HOLLINS: Did he, or did he not?

A Yes, he did. Yes, sir.

Q And did he, or did he not, actually reach a climax?

[fol. 130] A Yes, sir.

Q That's all.

THE COURT: Any questions, Mr. Looby?

MR. LOOBY: No, sir.

THE COURT: No questions?

MR. LOOBY: No, sir.

THE COURT: Come down.

Further this witness testified not.

* * * * *

GEN. HOLLINS: Call Dr. Core.

THE COURT: Dr. Core, please.

WILLIAM JESSE CORE, called as a witness on behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY GEN. HOLLINS:

Q Dr. Core, will you tell the Jury your full name?
A William Jesse Core. C-o-r-e.
Q Are you a doctor of medicine?
A I am.
Q Will you, briefly, Dr. Core, give this Jury your medical background? to qualify you for your statements?
MR. LOOBY: We will stipulate that Dr. Core is well [fol. 131] qualified.
THE COURT: All right, General.
GEN. HOLLINS: Dr. Core, you are a physician with the Metropolitan Government?
A Medical Examiner.
Q How long have you held that position or a similar position with the County?
A A little over 30 years.
Q Tell the Jury, briefly, Dr. Core, what your duties are as Medical Examiner?
A To assist the District Attorney in his work, we examine and determine the cause of death of all suicides, and murders, traffic, deaths—and all deaths who have not had medical attendance in 24 hours, and in rapes.
Q Dr. Core, I will ask you whether or not on January 22nd of this year you had occasion to see Mrs. Beamer here?
A I did.
Q Where did you see her, Dr. Core?
A I examined her at 10:15 P.M., on the 22nd of January, at Hubbard Hospital.
Q What, if anything, did your examination reveal? What kind of examination did you give her?
A We examined her to see whether she had had recent sexual intercourse.
[fol. 132] Q And what—what did you find?
A We found many moving male sperms in a smear from her vagina.

Q Did this have—

MR. WILLIAMS: That is objected to, may it please the Court.

THE COURT: On what grounds?

MR. WILLIAMS: On the ground that no proper foundation has been laid for his statement, about many —he said, "We found many moving male sperms.

A I did. I made the examination.

MR. WILLIAMS: No proper foundation has been made, if your Honor please.

THE COURT: Over r— rephrase your question, General, and lay the groundwork.

GEN. HOLLINS: Dr. Core, tell us exactly what you did, in the course of your work, to determine whether or not there were any sperms.

A We took an applicator and transferred some of the secretion from in to her vagina on to a glass slide and then we— I examined it under a microscope.

Q You did that?

A I did it all myself, yes.

THE COURT: All right.

Q by GEN. HOLLINS: And what did you find?

A Many moving male sperms, in the smear.

Q And, in your medical opinion, Doctor, what, if [fol. 133] anything, did this indicate to you?

A It indicated recent sexual intercourse.

Q What, if anything else, did your examination of this woman reveal?

A We examined her to see if she had any physical injuries, or any clothing damage.

Q Did she have any such damage?

A She did not.

Q Did she have any physical damage?

A She did not.

Q What about her clothing, then.

A Her clothing was soiled. I found some grass and dirt on her back side, and from that, it appeared that she had been down on her—

MR. WILLIAMS: We object to that, please.

THE COURT: No, you can't—

GEN. HOLLINS: Where was the grass and dirt located on her clothes?

A It was on her back.

Q Your witness.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q Dr. Core, did you take into custody this clothing you are talking about?

[fol. 134] A Did I—

Q Did you take into custody this clothing that you are talking about?

THE COURT: Custody of clothing.

A I did not.

MR. WILLIAMS: Could you tell how long it had been since she had had sexual intercourse?

A How long it had been since she had intercourse?

Q Can you state, medically, any particular time—

A From the fertility of the sperm, I would say it was within three hours.

Q Uh—what kind of clothing was she wearing?

A She had on a waist, as I recall, and a skirt and underskirt. That's the only thing I remember about it.

Q And that was the clothing that you saw the grass and dirt on, sir?

A The grass and dirt was on her back on the under part of her underskirt. It was dead grass.

A I see. All right.

GEN. HOLLINS: That's all, Dr. Core.

Further this witness testified not.

* * * *

THE COURT: Next witness, please.

GEN. HOLLINS: Lt. McDaniel.

[fol. 135] W. A. McDANIEL, Jr., called as a witness on behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY GEN. HOLLINS:

Q Will you give us your full name, please.
A W. A. McDaniel, Jr.
Q Where are you employed, Mr. McDaniel?
A Metropolitan Police Department.
Q What's your rank there?
A Rank of Lieutenant, Personal Crimes Section.
Q I will ask you, Lieutenant, whether or not you participated in the investigation of this case?
A Yes, sir.
Q State what you did in the course of your investigation. When did you, yourself, start investigating this particular case involving Mrs. Beamer?
A When this attack first occurred on Mrs. Beamer, on the night of January 22nd, 1965,—

MR. WILLIAMS: We object to that, if your Honor please. This man—there has been no evidence that he was there at the time of any attack. He, obviously, can not testify to that effect.

THE COURT: Yes, sir. You rephrase your question, General.

GEN. HOLLINS: I asked him when he started his [fol. 136] invesaigation—when did you start your investigation of the case?

A January 22nd, 1965.
Q What, if anything, did you do?
A Started an investigation of picking up any leads, or suspects, or whatever we could possibly find.
Q Speak up just a little bit louder, so the last gentleman can hear you.
A Yes, sir.
Q Did you, yourself, pick up any suspects?
A They were brought into the station, by the officers.

MR. LOBBY: If the Court please, that's not responsive to the question.

THE COURT: That is not responsive to the question. Answer his question, Lieutenant. Did you, yourself, pick up any suspects?

You can answer that Yes, or No, then make any explanation you wish.

A No, I didn't myself.

Q by GEN HOLLINS: Were you, yourself, present when any suspcts were brought in?

A I was, sir.

Q And do you know how many there were?

A There were several suspects brought in, and

Q Yes, sir.

A —just at the number, I can not recall.

[fol. 137] Q Was Mrs. Beamer present at any time when these suspects were brought in?

MR. WILLIAMS: Please the Court, we object to this. We fail to see what relevancy this has as to the guilt or innocence of the Defendant, and we respectfully submit that it is irrelevant, immaterial and incompetent.

Q What he did before this investigation—

A by MR. WILLIAMS: What he did in terms of some other individual having no relation to this Defendant is immaterial in this.

THE COURT: Yes. I think you should confine it to this Defendant, General.

GEN. HOLLINS: On or about August the 17th, of this year, did you have occassion to see this lady?

A I did, sir.

Q Where was that?

A At headquarters at Homicide Bureau.

Q How did that take place? What was the reason for being there?

A We had the Defendant in custody and we sent the officers out to get Mrs. Beamer to come to headquarters to view the subject and to see if positive identification—

Q Did you do that?

A Yes, sir.

Q Who were the officers?

A Sgt. Woods was—Detective Bailey and John [fol. 138] Smith went and brought her to headquarters.

Q Were you present, at any time, when she viewed the Defendant?

A I was, sir.

Q What, if anything, took place?

A Mrs. Beamer was in the office directly across from mine, and we had the Defendant come and stand—walk up the hall and then come and—come back and stand in front of the room, which, without any hesitation, she—

MR. WILLIAMS: We object to that, if your Honor please.

THE COURT: I overrule your objection. He can testify to what he did. Note an exception to the Court's ruling.

MR. WILLIAMS: His testimony as to without any hesitation and what she did is immaterial, we submit, if your Honor please, and irrelevant, because she has already testified that she identified the Defendant, and any further testimony with regard to what he saw her do at some time, and/or times, in the past, present, or future, is immaterial and irrelevant and self-serving.

THE COURT: Overrule your objection. Note an exception to the Court's ruling.

MR. WILLIAMS: Yes, sir.

GEN. HOLLINS: At any time, were you present when the Defendant was asked to talk?

A Yes, sir.

Q And what—when did that take place?

[fol. 139] A Right at that time when she iden—saw him, she asked us to have him repeat a question which he repeated. That, and she also by voice, yes, sir.

Q Lt. McDaniel, are you familiar with any picture of this Defendant that appeared in any of these mediums?

A Yes, sir.

Q What paper, if any, did the picture appear?

A It appeared in the Nashville Tennessean.

Q Was that before or after this woman identified the Defendant?

A It was after, sir.

Q How long after?

A Next day after, sir.

Q Your witness.

CROSS EXAMINATION

BY MR. LOOBY:

Q Lt. McDaniel, did you make the arrest of this young man? as the warrant states?

A Sir?

Q Did you make the arrest? I believe if the warrant shows you made the arrest, that is a mistake?

A Sir?

Q Did the warrant show that you made the arrest?

A No, sir, I didn't make the arrest.

[fol. 140] Q If the warrant showed you made the arrest, that is a mistake?

A Sir?

Q If the warrant showed you made the arrest, that is a mistake?

(confusion of voices follow)

THE COURT: Well, I tell you, Mr. Looby, rephrase your question. The warrant speaks for itself. It's part of the official record.

(Gen. Hollins and Mr. Looby talk at the same time)

THE COURT: Go ahead and cross examine him.

A I couldn't understand. I'll be frank with you.

GEN. HOLLINS: I think he ought to use the warrant —if that's what the warrant says.

MR. LOOBY: Didn't I say that about was that what the warrant says?

(more confusion of voices)

THE COURT: Just a minute, Gentlemen.

A Yes, sir, it would be no error.

MR. LOOBY: Sir?

THE COURT: The question is—Ask him the question again, Mr. Looby. Let's get his question.

MR. LOOBY: If the warrant shows, or states, that you made the arrest, then it would be an error, wouldn't it?

A No, sir.

Q It would not be an error?

[fol. 141] A No, it wouldn't be if the warrant shows it, no, sir.

Q You said if the warrant so shows, it is not an error?

A That's correct, sir.

Q Well, I don't know what you mean by that's correct. Then it is an error?

A No. If the warrant shows that I made the arrest, then it is not an error.

Q I see. Then you made the arrest?

A I didn't get the warrant out. I didn't —uh— I read the warrant to him, he was taken then by other officers from there as being booked,—

Q Have you got something of record or note where it occurred? Have you got a record of this? This case?

A Not in my notes, no, sir.

Q Well, what have you got in your notes?

A (starts to answer)

Q And when did you make those notes?

A I made my notes on the back of the case at the date—the 17th—the evening of the 17th—the afternoon of the 17th—

Q You made the notes then?

A Yes, sir.

Q Uh—now when—when did you first review [fol. 142] those notes since that time?

A Since August?

Q Yes?

A I've reviewed them—uh—before the Grand Jury. I reviewed them also yesterday.

Q Did you make any changes in them on those occasions?

A No, sir.

Q Uh—by the way, he was told to talk—you told him what—did you tell him what to say?

Q I believe—

Q At the time that you were down there, too?

A No, I was standing in the room, but I did not tell him what to say.

Q Who told him what to say?

A I believe—I'm not sure—I believe it was Sgt. Woods. Harold Woods.

Q Sergeant—?
A Harold Woods.
Q But someone did tell him what to say?
A Yes, sir.
Q Not only tell him to talk, but the words he was to use?
A Yes, sir.
Q And he obeyed that?
[fol. 143] A Yes, sir.
Q Were you the one that took him before Judge Cornelius?
A Yes, I was present at Judge Cornelius'—
Q You did take him before Judge Cornelius?
A You mean bodily?
Q Yes?
A No, I didn't—didn't take him.
Q What officer took him before Judge Cornelius?
A At the—I don't know what time you are speaking of, sir.
Q Well, how many times did you go before Judge Cornelius with him?
A I went the next day after he was charged, in the General Sessions Court, at 1:00 P.M.
Q Did you ever take him before Judge Doyle?
A I didn't, no, sir.
Q Was he taken before Judge Doyle?
A Not that I know of.
Q You kept up—from the time that he was arrested, you kept up with the case from then on until now, didn't you?
A What case, sir.
Q This case. This is the only case we are talking about, is this case.
[fol. 144] A You mean I kept up with it?
Q Yes?
A I went to the Grand Jury, yes, sir.
Q And you went before Judge Doyle?
A I didn't go before Judge Doyle.
THE COURT: No, he says he did not go before Judge Doyle.

MR. LOOBY: Well, that's why I asked him if he didn't keep up with the case. Do you know when he went before Judge Doyle?

A I didn't take him before any judge.

Q I am not asking what you did—I am asking what was done. Was he taken before Judge—your say you don't know that he was taken there?

A I don't know what judge he was taken before or after serving the warrant, no, sir.

Q Do you know when he was taken before Judge Cornelius?

A No, sir.

Q As a matter of fact, when he was taken in there—he said he wanted to give him back to another court, didn't he?

A He sent him back to the Juvenile Court, yes, sir.

Q And he told you it was your duty to take him to another court, didn't he?

GEN. HOLLINS: May it please the Court, I object to that.

THE COURT: Yes, sir. I sustain your objection. It is [fol. 145] incompetent. The warrant is merely a facet of the indictment, We are trying it upon the indictment and not the warrant. All right, Gentlemen, I sustain the objection.

MR. LOOBY: We respectfully except, your Honor, please.

THE COURT: Note an exception to the Court's ruling.

MR. LOOBY: Your Honor, please, I'd like to have the Jury excused.

(Jury leaves the courtroom)

MR. LOOBY: Your Honor, please, when the Defendant was brought to Judge Cornelius, Judge Cornelius specifically reprimanded the police for their manner of handling this case, and (not understandable) that this was all one scheme of the Police Department to pin this crime on this Defendant. And that is the purpose of this.

THE COURT: Of course that is a procedural matter, that took place prior to the indictment by the Grand Jury of this Defendant on a felony charge, and it is

pure procedural and I—I think that it is immaterial in this trial at this time, therefore, accordingly, I will sustain the State's objection, and note an exception to the Court's ruling.

MR. LOOBY: If the Court please, recognizing and respecting the ruling of the Court in this, we would respectfully like further to show to the Court, within the court, for the purpose of pursuing this line of examination, we would show that the Defendant has been denied from the very beginning and it does begin from [fol. 146] the time of arrest, if your Honor please, and from the beginning of this prosecution, which is the arrest, that he has been denied due process of law, even as provided on state statutes and on state constitution. That is the purpose of it.

It is not only violating his rights as provided by State statute, and State constitution, but also the 14th Amendment to the Federal Constitution. He has been denied due process of law, and was not allowed due protection according to the law.

THE COURT: The date that he was carried to Juvenile Court—or the date you appeared before Judge Cornelius —what was the date of that? Was that the next day?

A I believe that was on the 18th.

THE COURT: On the 18th? And Judge Cornelius remanded back—remanded the case to Juvenile Court?

A That's correct, sir.

MR. LOOBY: We would like to call Judge Cornelius if it becomes necessary, your Honor, please.

THE COURT: Oh, I don't think it's necessary. You —you were present? you were there?

A Yes, sir.

MR. LOOBY: Yes, he was present. There were several of them. They kept him down there and brainwashed him as long as they could.

THE COURT: I think the State's objection is well taken, Mr. Looby, and the Court sustains it, and note an [fol. 147] exception to the Court's ruling.

MR. LOOBY: We respectfully except, your Honor.

THE COURT: Yes, sir. Bring the Jury back, please.

(The Jury returns to the Courtroom.)
(Mr. Looby continues his Cross examination)

THE COURT: All right, Mr. Looby.

Q Now, Lieutenant, you say you have your notes there that you made at the time of the occurrence?

A Yes, sir.

Q Are they official? or personal?

A Well, they're an official report.

Q If they're official, may I see them?

A Yes, sir.

Q Will you pass them to me, please? Mr. Officer, will you pass them to me?

(notes are given to Mr. Looby)

Q Did you make these notes, Lieutenant?

A I made that one on the top, sir, where it has my name at the end.

Q Where did you say you made it?

A Right on top at the back. The top sentence.

Q You typed that yourself?

A Yes, sir.

Q On the same date?

A Yes, sir.

Q You didn't type the rest of it?

[fol. 148] A No. I might have typed the other card. I am not sure. That was my job at that time.

Q Well, now do you know this—you are sure of this typing and not sure of the rest of it?

A Well, I know I typed that. The other was back in January, when the rest of it was made.

Q Now, Lieutenant, as I understand you, when she was brought down there on this date to identify this—she was just brought up there by one specific person-?

A That's correct, sir.

Q He is the only one, then?

A That's correct.

Q Are you familiar with that neighborhood out there around Meharry?

A Fairly well familiar, yes, sir.

Q And that place is well populated, isn't it?

A Yes, it's—except near the railroad track—it's not.

Q Well, it couldn't be well populated near the railroad track, but are there not some houses around in that neighborhood?

A That's right. A lot of houses.

Q A lot of houses?

A Yes, sir.

Q Now, Lieutenant, when you brought her down there, you told her that this was the suspect that she came [fol. 149] down to identify, didn't you?

A Do what, sir?

Q You told her that this was the suspect that she was down there to identify?

A No.

Q What did you tell her?

A We told her that we had a subject that we wanted her to identify—possibly identify, if she could.

Q Yes, that's what I thought, yeah. And that was in connection with this select charge that she had been raped? That was the suspect that you had for her to identify for that purpose?

A That's—that's correct. We showed her several.

Q Showed her several?

A We had—yes, sir, she reviewed several people and pictures.

Q Well, you just said that he was the only one there.

A In this period of time, I was speaking of.

Q Well, that's what I am talking about—that particular time?

A Just the one person on the morning or afternoon of August the 17th.

Q You brought her down to identify that one [fol. 150] subject?

A That's right. He walked by the door opening—her—where she was setting the door was open, which another lady was settin' in the office also,—

Q But that is the only colored boy you had there?

A Except the police officers.

Q Well, she wasn't going to identify any police officers, was she?

A No.

Q I believe that's all.
THE COURT: Any further questions?
GEN. HOLLINS: No.
THE COURT: Come down.
Further this witness testified not.

* * * *

GEN. HOLLINS: Call Mr. Bailey.

FLOYD BAILEY, called as a witness on behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY GEN. HOLLINS:

Q Mr. Bailey, state your full name, please.
A Floyd Bailey.
Q Where are you employed, Mr. Bailey?
[fol. 151] A Metropolitan Detective Division.
Q Were you so employed back in January this year?
A I was.
Q Did you have occasion to investigate this rape case that we are concerned about up here today?
A I did.
Q What day did you get a call on it? when it was assigned to you?
A I didn't get an assignment. We was trying to contact everybody in that specific area, around Mrs. Beamer's.
Q And did you contact everyone out there?
A I did. Mrs. Beamer.
Q And what did you do after you contacted her?
A We carried some pictures for her to look at.
MR. WILLIAMS: Oh, I object to that, if your Honor please. It is irrelevant whether he carried some pictures for her to look at. It is irrelevant, to any issue in this case.
THE COURT: I think that in the course of the investigation for whatever value it has, that he may go into it, and overrule your objection, and note an exception to the Court's ruling. You may—go ahead, General. Overrule your objection and note an exception to the Court's ruling.

GEN. HOLLINS: Did you, or did you not, get the original call to go out there the night that it occurred?

MR. WILLIAMS: Object to the leading question.

A No.

[fol. 152] GEN. HOLLINS: I said, Did he, or did he not?

THE COURT: He said, No, so that already answers it.

GEN. HOLLINS: Were you, or were you not, the one that brought this lady up to headquarters?

A I was.

Q When was that?

A Uh—it was the 17th of August.

Q What was the reason that you brought her up there?

A Uh—to look at a suspect, that we picked up.

Q Who was the suspect?

A Mr. Biggers.

Q Who else was with you?

A Officer John Smith, the one that went with me to pick the lady up.

Q Were you present when any identification was made by this woman?

A I was.

Q When was that?

MR. WILLIAMS: That is objected on the same grounds that—

A On the 17th.

MR. WILLIAMS: —that it is immaterial,—that I objected to on the other—it is immaterial and incompetent. She has already testified with regard to how identification—and that identification has to be weighed by the Jury on the basis of what she has [fol. 153] testified, not on the basis of what—of this happened—a test to try to build it up by having about three or four police officers come in here and say, Why, yeah, I saw her identify him. That is not evidentiary, your Honor.

GEN. HOLLINS: We object to Mr. Williams' statement in the presence of the Jury, and it was made for that purpose.

THE COURT: The objection is overruled, and note an exception. You will disregard remarks among Counsel, Gentlemen. Go ahead, General.

GEN. HOLLINS: Was identification made at that time?

A Yes, sir.

Q Were you present, at any time, when Defendant talked?

A I was.

Q Was Mrs. Beamer—was she able to identify anybody?

A Yes, sir.

Q Who?

A Biggers.

Q Your witness.

CROSS EXAMINATION

BY MR. LOOBY:

Q Who told him to talk?

A I don't remember.

[fol. 154] Q It was one of you officers who told him to talk, wasn't it?

A I didn't. I don't—

Q But you were right there when you heard the remarks, weren't you?

A I don't remember what officer asked him to say the words in the officers' presence.

Q But you know what was said? they told him to say.

A I don't know exactly the words he was asked to say.

Q We wish you could remember that. You remember everything else.

GEN. HOLLINS: I object to that. That's not proper. Both he and Mr. Williams are doing it for a purpose.

THE COURT: Don't argue with him, Mr. Looby. You may ask him. Go ahead.

MR. LOOBY: You haven't even referred to your notes, but you remember very definitely it was August 17th?

A Yes, it was.

Q You have a good memory as to that?
A I have the date of—of when we picked her up, Mr. Looby.
Q And you have the date as to what occurred then?
A I have the date when we picked her up, on the [fol. 155] 17th of August.
Q And you went there—did you take her down and let her view—to view the suspect?
A Your question?
Q And she knew what it was she was going there for?
A I don't think she knew the man's name, no.
Q But did she know she was going to look at one man?
A A suspect.
Q Well, (laughs) you didn't like the way I put it? Did she know she was going just to look at one man?
A She didn't know how many she was going to look at.
Q What's that?
A She didn't know how many men she was going to look at.
Q Did you tell her?
A No, I didn't.
Q Who told her?
A I was under instructions from headquarters to pick her up and bring her to headquarters. I hadn't told her how many men she was going to look at, cause I didn't know.
Q But who told her about what she was going there for?
[fol. 156] A We told her—Officer Smith and I—that they wanted her at headquarters to look at a suspect.
Q Did you tell her?
A Did I tell her?
Q Yes?
A Yes, I told her.
Q Well, you told—what did you mean?
A We both told her. When we picked her up, we told her.
Q You told her you had one suspect, and you wanted her to go look at him and try to identify him.

A I didn't say one or two. I said we had orders to pick you up and bring you to headquarters to look at a suspect.

Q You told her you had a suspect?

A That's right.

Q Well, a means one, doesn't it?

A I didn't tell her how many people she was going to look at.

Q Mr. Bailey, you realize what I'm talking about, don't you?

A Yes, sir.

Q You know what this case is all about?

A Yes, sir.

Q And you want to be fair and honest with this Defendant, don't you?

[fol. 157] A That's right.

Q Now, did you tell her, at the time, that you had a suspect and they wanted her to come and identify him?

A I said they they wanted her at headquarters to look at a suspect.

Q And you two went out to look—to look at a suspect? At a suspect?

A That's right.

Q And he was the only one that was there when she went to look there at a suspect?

A Yes, sir.

Q So you asked her to look at a suspect?

A Yes, sir.

Q So you actually took her down there to see him, and him alone?

A I carried her to the Detective Division to look at a suspect they had up there.

Q And the suspect is this Defendant?

A That's right, sir.

Q And you told him what to say—you told him to talk?

A No, I didn't.

Q Who told him?

A I don't remember.

THE COURT: He stated, One of the officers told him, but that he did not.

[fol. 158] MR. LOOBY: How many officers were there?

A Uh—Sgt. Woods, Lt. McDaniel, Officer Cathey, and Officer Smith and myself, I believe.

MR. LOOBY: Is Sgt. Woods here?

A No, he is not.

Q You remember what—you remember one of the officers told him to talk?

A Yes, sir.

Q Well, do you remember anything said about, Shut up, or I'll kill you. Were they those words? in connection with this case?

A No more than Mrs. Beamer told us. When we were talking to her, she told us.

Q And that's what Mrs. Beamer told you that he had said?

A That's right.

Q And that's what he was told to say?

A I don't remember. I don't know.

Q Sgt. Bailey, you know how important this case is, do you not?

A Yes, sir.

Q And your memory fails at the details?

A Mr. Looby, I can't say what they actually said, as I don't remember what was said.

Q But that was one of the ways she identified [fol. 159] him, wasn't it?

A No, she identified him by looking at him, and said he was the one.

Q Once she looked at him, that was all by which she identified him?

A No, he said something, but I don't know exactly what he said, sir.

Q He was told to say something?

A Yes, sir.

Q Was that for the purpose of identifying him?

A I imagine partly it was.

Q You imagine?

A Partly.

Q Whereabout in the jail did all this occur?

A It didn't happen in the jail. It happened in the Detective Division.

Q Well, now,—

A She was sitting there in the Detective Division in a room there. And remember I said Biggers was standing in the hall there, which runs the full length of the department, and he was in the hall.

Q And he was shown while the course of the investigation was going on, for the purpose of identification.

A Well, he stood in the hall, and then he came close to—

[fol. 160] Q Came towards—to the room, is that it?

A Close to the door. He was in the hall, and then he walked to the door.

Q When was it he was asked to talk?

A Uh—when he was standing in the door.

Q Had she identified him before he was ever asked to talk?

A Sir?

Q Had she identified him before he was ever asked to talk?

A Yes, sir.

Q Well, why was he asked to talk?

A I don't know, sir.

Q Well, you were right there, weren't you?

A Yes, sir.

Q How large is that room, Sergeant?

A How large is it? Uh—it's not quite 9 x 12, I believe.

Q 9 x 12?

A Not that large.

Q Not—

A Not much larger than one of these witness rooms back here.

Q And not much larger than that?

A Probably as large as the Jury room back there.

[fol. 161] Q And that was—where did—where was he required to walk—where did he walk with reference to that room?

A Well, we have about—the hallway runs the full length of the floor—probably about six rooms of the same size running up and down the hallway, and she was sitting in the check box.

Q I am talking about where this Defendant walked. Where did he walk?

A Where did he walk?

Q Yes? Where was he standing in the hall?

A He's down in the hall with his back toward the door of the Homicide Office, facing the check room.

Q Is Sgt. Woods on duty today?

A I'm not for sure.

Q He hasn't been up here?

A No, he's been awful sick. I don't know whether he's back on duty or not.

Q How long did you have this man in custody down there?

A How long did I have him in custody?

Q Not you. The police?

A I don't know.

Q You're no longer down at the Police Station?

A No, sir.

Q You're no longer down in jail?

A No, sir.

[fol. 162] Q Of course you checked, and you knew he was 16 years old at the time?

A Have I checked it?

Q Checked and knew he was 16 years old?

A No.

Q You didn't ever check that out?

A After he wasn't my prisoner, I didn't have any right to check it.

Q What right did you have to do everything else that you did?

GEN. HOLLINS: Now, that's arguing, may it please the Court?

MR. LOOBY: It is a question of right, if your Honor please.

THE COURT: Yes, I think we are getting far afield, gentlemen. The officer has testified that he did not check his age.

MR. LOOBY: You say you don't know how long he was in custody down there?

A No.

THE COURT: He says he doesn't know, Mr. Looby. Any further questions, Gentlemen?

MR. LOOBY: That's all.

THE COURT: Any further questions, General?

GEN. HOLLINS: No, sir.

THE COURT: That's all.

Further this witness testified not.

[fol. 163] GEN. HOLLINS: Call Francesca Beamer.

THE COURT: Have a seat there.

FRANCESCA ELAINE BEAMER, called as a witness on behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY GEN. HOLLINS:

Q Francesca, I want you to speak up just as loud as you can. I know you've got a low voice, but it's very important that these gentlemen of the Jury hear you.

What is your full name, please, ma'am?

A Francesca Elaine.

Q You are going to have to speak up just a little bit louder for them to hear.

MR. LOOBY: So I can hear also.

THE COURT: All right.

A Francesca Elaine Beamer.

GEN. HOLLINS, Francesca, how old are you now?

A 13.

Q Back in January, when this occurred, how old were you?

A 12.

Q Are you a little bit scared today?

A No.

[fol. 164] Q Were you at home the night this trouble happened out there?

A Yes.

Q What was the first thing you knew that there was any trouble? What did you hear? or what did you see?

A I heard my mother scream.

Q What was she screaming?
A Oh, she was just hollering.
Q And what did you—where were you when you heard her scream?
A In my bedroom.
Q Now, you're going to have to speak up a little louder.
THE COURT: Speak up louder. Where were you?
A I was in my bedroom listening to my—
GEN. HOLLINS: What did you do when you heard her scream?
A I ran out in the hall.
Q What did you see when you ran out in the hall?
A (answer not intelligible)
THE COURT: Get your voice up a little louder.
MR. LOOBY: I can't hear her.
GEN. HOLLINS: What did you see when you ran out in the hall?
THE COURT: Wait just a minute.
[fol. 165] A The man was standing over my mother with a knife and she was down in the floor.
Q Now, what kind of looking man was he?
A Well, he was tall, and he was kind of big and dark.
Q Was he a Negro man? Or a white man?
A Negro.
Q Are you, yourself, able to state whether it was the Defendant, or not?
A No.
Q Do you recall how he was dressed?
A The only thing I saw was he had on a short-sleeved shirt, that's all I saw.
Q Did you hear him talk?
A Yes.
MR. WILLIAMS: Did you hear what she said?
THE COURT: She said he had on a—speak up a little louder, please. What did you say that you could recall that he had on?
A He had on a short-sleeved shirt.
GEN. HOLLINS: Did you hear him talk?
A Yes.

Q What did he say?

A Well, he told my mother to tell me to go back in the room and to close the door.

Q What did he say, if anything, about if you [fol. 166] didn't?

A Oh, he said that he'd kill me and her both.

Q Did he have a—what kind of voice did he have?

MR. WILLIAMS: Said he would kill you and what, young lady?

GEN. HOLLINS: She said—

A and her both.

THE COURT: Speak up a little louder. What did he say he would do?

A Said he would kill me and her both.

MR. WILLIAMS: And her both?

A Will you repeat the question?

GEN. HOLLINS: What kind of voice did he have?

A He had a young voice.

MR. WILLIAMS: Well, I object to that, if your Honor please, that he had a young voice.

THE COURT: What's your objection, Mr. Williams?

A by MR. WILLIAMS: That he had a young voice.

THE COURT: To a young voice? This witness can testify in her opinion, what type of voice it was. You may cross examine her. Go ahead, sir. Overrule your objection.

GEN. HOLLINS: What, if anything, did your mother do?

A You mean what did she tell me to do?

Q What did she tell you to do then?

A She told me to go back—

[fol. 167] THE COURT: Speak up louder, please.

A She told me to go back in the room and close the door.

GEN. HOLLINS: Did you do that? or not?

A Yes.

MR. WILLIAMS: Now, if your Honor please, I am tired of this leading. I—I object to it, and I am asking —I have objected to it time and time again, and I ask the Court to please to instruct the Attorney General—he is a competent lawyer and able to phrase a non-leading question—not to lead witnesses, and force me to stand up here in front of this Jury and keep objecting.

GEN. HOLLINS: Well, let me be heard on this.
THE COURT: All right.
GEN. HOLLINS: (gives his views on this objection)
MR. WILLIAMS: (replies to Gen. Hollins)
THE COURT: All right, General. Rephrase your question.
GEN. HOLLINS: What did you do?
A I went back in the room and closed the door.
Q When did you come out?
A I didn't come out till she came back home cause I thought they were still there.
Q Thought who was still there?
A The man and my mother.
Q How long was your mother gone?
[fol. 168] A About 10 or 15 minutes.
Q Why did you not come out?
A Because she had told me to go back there, and I thought they were still in the house because I heard the record—she was listening to an opera before he broke in and I heard the opera—
THE COURT: You let your voice drop down, now. Speak up louder, and state why you didn't go back.
A I heard the people in the opera talking and I thought that was them, and she had told me not to—she had told me to go back there, and I thought they were still in there, and I was scared to come out.
THE COURT: Did you hear her?
GEN. HOLLINS: What—
THE COURT: Just a minute. He couldn't hear it. Speak up louder, and say that you said you thought—well, I am not going to say what you said—you speak up real loud, so the Jury and Mr. Looby and Mr. Williams all can hear you. Why didn't you go back out?
A I thought they were still in the house because I heard the people on the opera talking, and I thought that was them, and I was scared to come out.
MR. WILLIAMS: On the opera?
THE COURT: Yes, she was playing records? Is that what you said?

[fol. 169] A No, she was listening to the opera on FM.
MR. WILLIAMS: Which opera?
THE COURT: Beg pardon?
A FM on the radio.
THE COURT: Your mother was listening to the opera on the FM radio?
A Yes.
Q by the COURT: Is that what you said?
GEN. HOLLINS: Your witness.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q Had you gone to bed?
A No.
Q You were not in your night clothes? you were fully clothed?
A Yes.
Q Do you have a little brother, Miss Beamer?
A Yes.
Q How old is he?
A 6.
Q Where was he?
A Now?
Q In the same room with you?
A No, he was in bed.
THE COURT: Speak up a little louder, please.
[fol. 170] A He was in the back room in bed.
Q Would that be this room back here? (points to blackboard) that room?
A Yes.
Q And you were in this room? then?
A I was in the room right there, yes.
THE COURT: Come down to the board, so that you can see this diagram.

(she goes down to the board)

MR. WILLIAMS: You have three bedrooms in the house?
A Yes.

Q Is there a bedroom in the center of the house? Back of the hall?

A (Her answer can not be heard on the record)

THE COURT: We can't hear.

A Yes, that's the extra bedroom.

Q Well, is there a hall in front of that bedroom next to the living room? that faces the living room?

A That's the bathroom.

Q Where is the bathroom? Oh, is this the bathroom?

A Yes, this is the bedroom right here.

Q This is the bedroom right here? Is that right?

A And there's one right here.

[fol. 171] Q There's one right here, too?

A Yes.

Q That's a bedroom?

A Yes.

Q Now, which bedroom were you in?

A This one right here.

Q You were in this one?

A Yes.

(she comes back to the stand)

Q Miss Beamer, what lights were on in the house?

A The one in the living room, and the one in the room that I was in.

THE COURT: You keep your voice up, please, so all the Jurors can hear. The one in bed—what did you—

A The one in the bedroom that I was in, and the one in the living room.

MR. WILLIAMS: What kind of lights were they?

A The one in the bedroom—it was a ceiling light. And let me see—

Q Just a single bulb ceiling light?

A Yes, and the one in the living room was a lamp.

Q A lamp?

A Yes.

Q A single bulb lamp?

[fol. 172] A Yes.

Q With a shade on it?

A Yes.

Q All right. Did you have your door shut?

A Yes.

Q You had your door shut at the time you heard your mother scream?

A Yes.

Q Where is this radio that you were talking about playing opera?

A Sir?

Q Is that in the living room?

A Yes.

Q Was that playing loud or soft?

A It was playing medium, I suppose.

Q Medium? And you were playing records with your record player in the bedroom?

A Yes.

Q What were you playing?

A What kind of records?

Q Yes?

A Oh, the Supremes and the Impressions.

Q Ma'am?

THE COURT: Speak up louder.

A The Supremes and the Impressions.

[fol. 173] MR. WILLIAMS: The Supremes and the Impressions? All right. And you heard your mother scream above all that?

A Yes.

Q Now, when you heard her scream, did that scare you?

A Yes.

Q You thought something had happened to her?

A Yes.

Q All right. So, I guess you threw open the door and rushed on out into the hall, didn't you?

A Yes.

Q Now, exactly where was your mother?

A She was between the living room door—I mean the doorway that leads to the living room from the hall—

THE COURT: Speak up louder, please.

A And between the door that leads from the hall to the kitchen.

THE COURT: Can you Gentlemen of the Jury hear?

MR. WILLIAMS: Do you mean that she was over here in that part of the hall? or that vicinity? somewhere?

A Yes.
Q Toward the kitchen door? Would you say she was pretty much in the kitchen door?
A No, not that much.
Q Was that door open—the door from the living [fol. 174] room into the hall?
A Oh, there's no door in there—it's just a—
Q Just an opening?
A Yes.
Q How big is the opening?
A Just about the size of that.
Q About the size of an ordinary door?
A Yes.
Q Was there a curtain or a drape over it?
A No.
Q Just open?
A Yes.
Q Where was this lamp in the living room?
A It was next to the chair that was next to the door that leads outside.
Q In which corner? In the—in this corner over here which would be the northwest corner? or in this corner over here which would be the northeast corner?
A The northwest corner.
Q The northwest corner? Now, you say your mother was down on the floor?
A Yes.
Q And this man was standing over her?
A Yes.
[fol. 175] Q In what way?
A I don't know.
Q How many times have you discussed this with your mother?
A Well, about three times, I guess.
Q How many?
THE COURT: Speak up louder. About three times she said.
MR. WILLIAMS: The fact of the matter is you discussed it too many times to mention, didn't you?
A (hesitates)

Q And isn't it a wonder you hadn't been sort of excited?

A It was, yes.

Q Yes? And also I guess you have discussed it with your little frinds, haven't you? too? and they asked about it?

A Yes, the day after it happened.

Q Now, did this man have his face toward you? or his back toward you?

A His face towards me.

Q Was he in the kitchen doorway?

A Yes.

Q How big is that hall, exactly? Miss Beamer?

A Well, it about from that corner of the table to the end of it.

[fol. 176] Q About from the corner of this table to the jury box there?

A Yes.

Q You say you've got a hall in that house that's 12 feet wide?

THE COURT: Which table were you pointing to?

A Well, I was really talking—

MR. WILLIAMS: Are you talking about this table or this table?

A That table.

Q Ma'am?

A The table that my mother (Her voice dwindles away)

Q Well, let me ask you this: Is this hall a big hall? or just a little hall?

A I guess a little hall.

Q Would you say that at the time that you saw this man standing over your mother that you were just a few feet from him?

A Yes.

Q And would you say that maybe he wasn't any farther from you than I am now?

A I think I went right up there to him.

Q You think you went right up to him?

A Yes.

[fol. 177] Q You might have gotten within a foot or so of him?

A Yes.

Q You didn't say anything to him at all?

A I told him not to hurt my mother.

Q Told him not to hurt her? What was your mother doing at the time?

A She was crying, I think.

THE COURT: Speak up louder. What was she doing?

A I think she was crying.

MR. WILLIAMS: Well, at that time, he didn't have his hands on her?

A That's right.

Q And you actually didn't know what had gone on between them? All that—you just heard Mrs. Beamer?

A Yes.

Q Was she still screaming when you came out?

A I don't remember.

Q Did you say that he had any weapon, or anything, in his hands?

A Yes, he had a knife.

Q What kind of knife?

A It was a silver one.

Q You know how large it was?

A It was about this long.

Q About that long?

[fol. 178] Q Did he have a hat on?

A No.

Q Was this shirt—short-sleeved shirt—open, or closed, at the neck?

A Well, I think it was closed. It might have been—

Q Did you see what size shoes he had on?

A No.

Q You weren't—after you saw him there, you weren't unduly alarmed, were you? after that?

A Yes.

Q Did you think he was going to harm your mother?

A Yes, I—I suppose so. I wasn't sure about it.

Q So you closed the door? I guess that was the reason you closed the door? and went on back in your bedroom?

A That's what they told me to do. So I did it.

Q He and your mother told you to?
A He told my mother to tell me that.
Q I thought you said a while ago that he told you that, too?
A No, he told my mother to tell—to tell me to do that.
[fol. 179] Q To tell you to go on back in the room?
A Yes.
Q Did she tell you to do that?
A Yes.
Q Did your little brother wake up?
A No.
Q Did you close your door after you went back in your bedroom?
A Yes.
Q Were you fully clothed?
A Yes.
Q Now, tell me—what was your mother wearing that evening?
A She was wearing a short-sleeved blouse and a pair of brown slacks.
Q All right. And when she was down in the floor she was wearing these slacks?
A Yes.
Q Does your mother frequently wear slacks around the house?
A Yes.
Q All right. You did close the door when you went back in the bedroom?
A Yes.
Q And what did you do?
[fol. 180] A Well, I was sort of scared. I got in bed with my little brother.
Q You did what?
A Since I was scared, I got in bed with my little brother.
Q Oh, is there a connecting door between your bedroom and that of your little brother?
A Yes. It's not a door, it's just like that—
Q An opening?
A Yes, an opening.
Q All right. Did you take off your clothes?

A No.

Q You got in bed with your clothes on with your brother?

A Yes.

Q Are there windows in your bedroom?

A It's one—

Q Or in his?

A It's one window in my bedroom, and it's two two in my brother's bedroom.

Q One in your brother's bedroom?

A There's two in my brother's bedroom. There' one over there where the door is, that leads to the outside, in his bedroom.

Q You say there's a door leading to the out-
[fol. 181] side? in your brother's bedroom?

A Yes, the door is locked.

Q Locked? Well, can you open it from the inside?

A No, we didn't—we don't ever use that door.

Q All right. But, at the same time, there were two windows there, also, were there not?

A Yes.

Q Is there a connecting door between your bedroom and your—I suppose this is your mother's bedroom, this front bedroom? Is it not?

A Yes.

Q Is there a connecting door between your bedroom and that bedroom?

A No.

Q Your home is a one-story home, is it not, Miss Beamer?

A Yes.

Q This house over here is real close to your house, isn't it?

A Yes.

Q Who lives there?

A A lady by the name of Mrs. Leach.

Q A lady by the name of what?

[fol. 182] A Mrs. Leach.

Q Leach? Is she at home?

A Yes.

Q Is she at home all the time?

A Yes.
Q Was she at home that night?
A I suppose so.
Q Did she say anything about the screams?
A No, I don't think—
GEN. HOLLINS: That would be hearsay. I object to it.
THE COURT: Yes, sir. Yes, sir.
MR. WILLIAMS: This is cross examination, your Honor.
GEN. HOLLINS: That doesn't—
THE COURT: I sustain your objection. It calls for hearsay evidence.
MR. WILLIAMS: Did you think about the possibility of getting out of one of those windows, and running over and knocking on the door of the lady next door and trying to get some help?
A Well, I didn't think about that.
Q That didn't occur to you? Now, I guess you are familiar with all this area out there. How long have you lived in this area where you now live?
A Let's see. We moved there when I was five, so we have lived there—
[fol. 183] Q You've pretty much grown up out there, haven't you?
A Yes.
Q Do you play around that neighborhood during the summer time?
A Just on Almeda.
THE COURT: Speak up louder, please.
A Just on Almeda. I don't go off of that.
MR. WILLIAMS: You don't go off of that?
A No.
Q But you are familiar with the neighborhood there, aren't you?
A Yes.
Q There's a row of houses on Almeda (draws) all the way down the street on both sides, isn't there?
A Yes.
Q And you do know that up on Albion there is a row of houses? (draws on the blackboard again) up to this point? all the way down Albion Street? Isn't that right?

A Yes.

Q And, then, on the other side of the railroad track on Almeda there are houses on both sides? A row of houses on this side and one of these kind of long tenement kind of apartments houses down on that side, isn't there?

A Yes.

Q Have you ever been out there in the night-[fol. 184] time and you notice that at the apartment house there are numerous—they keep the lights on all night there—in front of that house?

A I don't know.

Q And, then, likewise on Albion up here on the other side of the railroad track, there are houses on both sides? aren't there?

A Yes.

Q And, of course, on down here in this more congested area—is there a house back of this house? that is opposite you all here, or not?

A On Almeda Street.

Q There is on Almeda? I see. There are houses all down Meharry Boulevard?

THE COURT: Erase that other there, Mr. Williams. That's not a house there.

MR. WILLIAMS: This one?

THE COURT: That's right.

MR. WILLIAMS: There are houses all down Meharry Boulevard, too, aren't there?

A Yes.

Q And, of course, that's on both sides of the trestle there? isn't it?

A Yes.

Q As a matter of fact, on around Meharry, [fol. 185] isn't there another business district there—down there at the corner of 21st—Brown's Drug Store, and some more there?

A Yes.

Q Do you remember how the weather was this particular day in question?

A I remember the night time better than the day time. I don't remember the day time.

THE COURT: Speak up louder, please.

A I remember the night time, but I don't remember the day time.

Q Was there snow on the ground?

A No, I don't think there was snow.

Q It was winter time—it was the 22nd of January, wasn't it? It was winter time, and it was cold outside? Is that right?

A No, I think it was warm outside.

Q You think it was warm outside?

A In the night time it was.

Q Maybe that was the reason you didn't want to go out the window and get to the neighbor's because it was cold outside?

Frankly, weatherwise, there wouldn't have been anything to keep you from opening the window and go out to try to get help, would there?

A No.

[fol. 186] Q Your father lives with you there, in the home?

A Yes.

Q Had he gone out to work?

A No, he had gone some place to get his law books.

Q To get his law books?

A Yes.

Q And he was expected back soon?

A Yes. He said he would be right back.

Q Be right back?

A Yes, he got back about ten minutes—

Q As a matter of fact, how soon did he get back?

A He got back about ten minutes after—

THE COURT: Speak up louder, please.

A See, after my mother came home. She had gone to call the police, and he came back about a few minutes after she had left.

Q by MR. WILLIAMS: What time was it? What time did you say it was? What time of day or night did this happen?

A About 9:00 o'clock.

Q And what time would you say it was when your mother got back down?

A About 9:15.

[fol. 187] Q Then, from the moment that—that you heard her scream to the time that she got back to the house was about 15 minutes? Is that right?

A Yes.

Q But you couldn't identify that man at all, could you?

A No.

Q And you heard him talk, just like your mother did?

A Yes.

Q Tell me, do I have a young voice? or an old voice?

A Well, I suppose an old voice.

Q Ma'am?

THE COURT: She said she supposes an old voice. Is that right?

MR. WILLIAMS: I have an old voice? Thank, you, you flatter me. That's all.

THE COURT: Any further questions, Gentlemen?

MR. WILLIAMS: No, sir.

GEN. HOLLINS: Step down, young Lady.

THE COURT: That's all, you may come down and have a seat in the courtroom, please.

Further this witness testified not.

* * * *

[fol. 188] GEN. HOLLINS: Call Mr. Frank Ritter.

FRANK LEE RITTER, called as a witness on behalf of the State, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY GEN. HOLLINS:

Q Mr. Ritter, will you tell the Jury your full name, please?

A Frank Lee Ritter.

Q Where are you employed, Mr. Ritter?

A At the Nashville Tennessean.

Q Were you so employed on August the 17th of this year?

A Yes, sir.

Q At my request—Have you brought with you an edition of the Nashville Tennessean of August the 18th?

A Yes, sir, I have.

Q Do you want to see that, please?

MR. WILLIAMS: Well, I object to this being exhibited here in the courtroom, if your Honor please.

GEN. HOLLINS: Now, Mr. Williams has made this statement and on Cross Examination of my witnesses, his theory was that this woman identified a picture before [fol. 189] she saw this man. I insist that it's proper.

THE COURT: Yes, sir.

GEN. HOLLINS: I maintain this is competent.

MR. WILLIAMS: Well, may it please the Court, may it please the Court, I can't—I can't shout quite as loud, but I would like to respectfully state to your Honor that I didn't, by any insistence of mine, agree to Counsel bringing into the courtroom and exhibiting to this Jury, in any fashion whatsoever, a newspaper.

GEN. HOLLINS: Who intends to make it an exhibit?

MR. WILLIAMS: Well, he has asked about it, and he has had this reporter bring it in here, if your Honor please, and—

THE COURT: Just a minute. Members of the Jury, you step out with the officers, please.

(Jury leaves the courtroom)

MR. LOOBY: May they stay, your Honor?

THE COURT: No, sir. No, Sir. Mr.—

MR. WILLIAMS: May it please the Court, I want the record to show—

THE COURT: Just a minute. Just a minute. Mr. Lawrence, come over here a minute.

Now, all right, Gentlemen. What is the—in the absence of the Jury—testimony of this witness?

GEN. HOLLINS: As I stated previously, if your Honor please, in the presence of the Jury, Mr. Looby, [fol. 190] in his examination of Officer Smith, I believe it was,—John Smith—stated that it is our theory that this woman viewed this picture in the newspaper prior to her identification.

And I think I have a right to prove when the newspaper article came on the streets, and do that with this subject,—I don't intend to introduce the newspaper article to the Jury.

I have a right to prove when it came out.

MR. LOOBY: If your Honor please, I think that the record will show that in the Cross Examination of the Prosecutrix, herself, she testified that she saw the picture in the morning, and went to the Police Station to identify him that afternoon. And I think that I—

GEN. HOLLINS: That's a misstatement.

THE COURT: Just a minute. Go ahead, Mr. Looby.

MR. LOOBY: I think the record will so prove, and I call for a reading of the record, and if it doesn't prove it, then that's a different proposition.

GEN. HOLLINS: Read back the Prosecutrix' testimony.

THE COURT: No.

MR. LOOBY: Let the Court decide it.

THE COURT: Now, Gentlemen (taps desk with the gavel) We are going to proceed in an orderly fashion, now, Gentlemen. The Court can hear one, and one at a time. I'll give each Counsel all the opportunity in the [fol. 191] world to be heard. During the examination yesterday, of witnesses, the question was asked if she did not identify this man until after the picture came out.

MR. LOOBY: Yes, sir.

THE COURT: That is in this record.

MR. LOOBY: Yes, sir.

THE COURT: The Court will permit the State to prove by this witness the date of the publication of that picture, and not to exhibit it to the Jury.

All other objections are overruled, and exceptions are noted.

This witness will be limited to the testimony as to when the picture appeared on the date in the newspaper, but not to exhibit any newspaper to the Jury.

MR. WILLIAMS: May it please the Court, I just wanted the record to show that—that Counsel laid the paper down on that table in the presence of the Jury, and, although they were at some distance, I am not sure that they could not have seen that from there.

THE COURT: Well, of course—

GEN. HOLLINS: Of course not, your Honor.

THE COURT: No, now—

MR. WILLIAMS: Maybe somebody did, your Honor.

THE COURT: Now, wait just a minute. Now, wait [fol. 192] just a minute. The witness was asked to make it an exhibit. The officer took the paper from the witness, and the officers laid the paper on the table.

I, for my life, could not tell you what the date of the paper was, or what was in the paper, and I feel certain that the Jury couldn't, but I will so instruct the Jury.

Bring the Jury back.

(The Jury is sent for)

THE COURT: Yes, sir?

GEN. HOLLINS: I want to make this newspaper an exhibit in the absence of the Jury.

THE COURT: You may put it in the record, but I am not going to exhibit it to the jury.

GEN. HOLLINS: Well, then—

THE COURT: The same as the other articles that were made exhibits during the examination of the—

GEN. HOLLINS: Well, we want this—

MR. LOOBY: Of course, your Honor, please, we object to it.

THE COURT: Well, in the absence of the Jury, let's be sure that we know which date and which paper we are talking about, now.

MR. LOOBY: I want to object to the paper being made an exhibit. I have no objection to ask the Attorney what date it was.

[fol. 193] THE COURT: Yes, sir. I want to see what the paper is. Hand it to the Attorney General and let him Cross examine the witness to prove—to see what he's going to prove by it.

GEN. HOLLINS: Mr. Ritter, I'll hand you this newspaper—I'll hand you these two newspapers, and ask you if you can identify them.

A Yes, sir.

Q The first newspaper I handed you is what newspaper?

A The Nashville Tennessean, for August 17th.

Q The Nashville Tennessean publishes how many newspapers in one day?

A It publishes—uh—four editions.

Q All right, sir. Now, I'll ask you whether or not the newspaper I have handed you is a local edition?

A Yes, sir, it is.

Q all right, sir. Now, I will hand you another newspaper, and ask you if you can identify that, Mr. Ritter?

A Yes, sir, it's the Nashville Tennessean, published the 18th, of August the 18th.

Q And what, if anything, appears on the front page of that newspaper, with reference to the case we are trying up here today?

A It has a three-column story on page 1, [fol. 194] about the arrest and charging of Archie Nathaniel Biggers, and it is accompanied by a two-column picture of the Defendant.

Q Did you write that story?

A Yes, sir, I did.

Q We would like to make these Exhibits #1 and #2 to Mr. Ritter's testimony.

THE COURT: Let Counsel see the paper.

MR. WILLIAMS: We object to these, if your Honor please, on the ground that they are irrelevant, and the way they are issued here, they are also prejudicial, and there has been enough prejudice to the Defendant by virtue of these news articles, and that is one reason why the Court had to spend two or three days here trying to select a Jury in this case, because of this kind of publicity. We respectfully object to the introduction of them.

MR. LOOBY: Your Honor, look them over, and see if they refer to other incidents.

THE COURT: I notice one said Bordeaux. The Court will limit the examination of this witness to the portion of his testimony as to the date a picture appeared in the paper, as to whether or not a picture appeared on the 17th or the 18th, and you may put those into the record, and over the objection made by Defense Counsel, Mr. Williams, is overruled and exception noted.

The portion as to the introduction of these [fol. 195] into the record which will not be exhibited to the Jury, and the Court will so instruct the Jury, to disregard any evidence of the newspaper this morning.

MR. WILLIAMS: May it please the Court, may I just ask Mr. Ritter one question? on Cross Examination? before the Jury comes back?

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q Mr. Ritter, state whether or not—state whether it is, or is not, a custom of the press, usually, in cases where charges have been made against juveniles in this county not to use the names and photographs of those juveniles?

A It is not the policy of The Tennessean.

Q Well, state whether or not there have been many instances in the past where juveniles were involved where the Tennessean did not publish their names and pictures?

GEN. HOLLINS: That's not competent at all.

THE COURT: Yes.

GEN. HOLLINS: Even in the absence of the Jury.

THE COURT: I think we are getting far afield, Gentlemen. That has no real bearing on this case. Mr. Clerk, you will take the newspaper, Tennessean, of the morning of August the 17th, and the morning paper of [fol. 196] August 18th, and the Clerk will so file them as part of the record.

(Clerk files the two newspapers as part of the record, witness, Mr. Ritter.)

THE COURT: All right, Gentlemen. Mr. Officer, bring the Jury back in, please.

(The Jury comes back into the courtroom)

THE COURT: Members of the Jury, just before you were asked to be excused, from the courtroom, a certain newspaper was presented to one of the Court officers, which was laid on the desk in front of the Bench and in front of the Court Reporter, You will not consider that as any evidence for whatever date that paper may have been, or what that paper may have contained. For the sake of the record, you are instructed to disregard

any evidence or consideration relative to a newspaper this morning. You will not consider it as such.

All right, General Hollins.

(General Hollins continues his Direct Examination of Mr. Ritter)

BY GEN. HOLLINS:

Q Mr. Ritter, at any time did you have occasion to write up a story concerning this matter we are concerned with today?

A Yes, sir, I did.

Q What day, if ever, was that story published in the Nashville Tennessean?

A The first story that I have written about [fol. 197] this Defendant was on August the 18th.

Q Was that story accompanied by anything else?

A It was accompanied by a two-column picture of the Defendant.

Q Now, Mr. Ritter, prior to your story being published, was it given to anybody else?

A It was given to—

Q Other than people at the newspaper?

A No, sir, it was not.

Q That's all. Cross examine.

THE COURT: Cross examine.

MR. WILLIAMS: No questions.

Further this witness testified not.

* * * *

GEN. HOLLINS: That's our case in chief, if your Honor please.

THE COURT: All right, Gentlemen, that's the State's case in chief.

THE STATE RESTS

THE COURT: We will take a short recess, and Members of the Jury, you will return to the Jury Assembly Room upstairs, please, with the Court Officers.

(Recess is had)

[fol. 198] THE COURT: All right, Gentlemen, are you ready to proceed? The State has closed its case in Chief. The first witness for the Defense.

EVIDENCE ON BEHALF OF THE DEFENDANT

MR. WILLIAMS: May it please the Court, the Defense calls the Defendant.

THE COURT: The Defendant will come around, please.

ARCHIE NATHANIEL BIGGERS, called as a witness in his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Now, talk so I can hear you.
A Yes, sir.
Q Now, you are talking o.k.
A Yes, sir.
Q State your name and address, please.
A Archie Nathaniel Biggers, 2106A Scoville St.
Q How long have you lived there at 2106A?
A About four years.
Q What is your birthday?
A January 14, 1949.
Q You were 16?
[fol. 199] A Yes, sir.
Q This past January?
A Yes, sir.
Q With whom do you live?
A My mother and stepfather.
Q What is your mother's name?
A Mrs. Marie Biggers.
Q And were you so living with her and your stepfather in January, 1965?
A Yes, sir.
Q Before the month of August, had you ever seen the Prosecutrix, Mrs. Margaret Beamer, in your life?
A No, sir.

Q Or did you know her?
A No, sir.
Q Did you, in the month of January, or any time, go into her house and at whatever address she said it was—2139 Meharry Boulevard?
A No, sir.

(Mr. Looby says something to Mr. Williams)

Q by MR. WILLIAMS: Sir? Where?
GEN. HOLLINS: Now, I am objecting to that. This—
THE COURT: Gentlemen, if you are going to communicate with co-Counsel, do it over here rather than across the courtroom.
MR. LOOBY: I was just checking the address.
[fol. 200] THE COURT: Oh? the address? all right.
MR. WILLIAMS: Well, the address isn't important. Have you ever been to this woman's house on Meharry Boulevard?
A No, sir.
Q Have you ever had your hands on this woman that you know about?
A No, sir.
Q Have you ever said anything to her prior to that day over there at the Police Station?
A No, sir.
Q Did you take her up on the railroad trestle there, and have relations with her at any time?
A No, sir, I didn't.
Q Did you tell these police officers that you didn't?
A Yes, sir.
GEN. HOLLINS: Objection to all these leading questions.
THE COURT: Yes, sir. It's a leading question.
GEN. HOLLINS: The same rule applies—
MR. LOOBY: What was the Court's ruling, your Honor, please?
THE COURT: I rule that it is a leading question. I sustain the State's objection.
MR. WILLIAMS: Yes, sir, but he didn't object until the answer had already been given.

[fol. 201] THE COURT: Well, Members of the Jury, you can disregard the last question and answer, and you rephrase your question, Mr. Williams.

MR. WILLIAMS: May it please the Court, I respectfully submit that that was not done when I objected to his leading questions.

THE COURT: Mr. Williams, you can note an exception to the Court's ruling, and you can rephrase your question.

MR. WILLIAMS: Yes, sir, I would like the record to show that I objected at least a half a dozen times—

THE COURT: Yes, sir, the record already shows that you have objected. You will proceed with your examination.

MR. WILLIAMS: Now, Mr. Biggers, were you asked by the police whether or not you had committed any act—

A Yes, sir, by Lt. McDaniel.

Q Sir?

A By Lt. McDaniel and Tom Cathey.

Q And what did you tell them?

GEN. HOLLINS: That is a self-serving declaration, if your Honor please. I object to it.

MR. WILLIAMS: Well—

THE COURT: It would be a self-serving declaration, and the Court sustains the objection as to being a self-serving declaration, and note an exception to the Court's ruling.

MR. WILLIAMS: I would respectfully like to go in [fol. 202] the opposite, of course. Counsel has been allowed to bring in here at least six witnesses—not six, and these three or four witnesses that have been allowed to testify that this woman identified this man in their presence.

Now, am I not going to be allowed to have him deny that he ever did—

THE COURT: You may ask him if he denied it. You may ask him that.

MR. WILLIAMS: Did you deny it?

A Yes, sir.

GEN. HOLLINS: May it please the Court,

THE COURT: No, sir. No, sir. Go ahead, Mr. Williams. Your answer—what was your answer?

A No.

THE COURT: All right.

GEN. HOLLINS: Now, wait a minute. He's cross examining him on—

THE COURT: Wait just a minute. Just a minute. (Raps with gavel)

MR. WILLIAMS: Your Honor, his answer—

GEN. HOLLINS: May I finish—

THE COURT: Just a minute, General. The question was, Did you deny it?

A Oh, yes, I did.

Q All right, sir. You denied it? All right. Go ahead, [fol. 203] Mr. Williams.

MR. WILLIAMS: Where were you when you first saw Mrs. Beamer?

A At the Juvenile.

Q At Juvenile Court? What day was that?

A Oh, I don't really know.

Q The day you were arrested?

GEN. HOLLINS: I object to that, if your Honor please. It's a leading question.

THE COURT: Don't lead—don't lead him, Mr. Williams. He says he doesn't recall the day he saw her at Juvenile Court.

MR. WILLIAMS: You have heard her testimony here about having identified you over at the Police Station?

A Yes, sir.

Q You heard that? Will you just relate to the Court and Jury how that occurred on that occasion?

A Well,—

THE COURT: Speak up loud, so all the Jury can hear you.

A Well, I was in a room all by myself when I noticed —.

Q You will have to talk up louder.

A I was in a room all by myself with another detective, R. B. Owen, and Lt.—I thing it was Sgt. Woods came in there and got me, and carried me to the room where she was. And there was another woman in the room

[fol. 204] with her. And I was facing her, just like I am facing this speaker right here, and she looked at me, and then she told him to tell me to say,—uh—Stop, or I'll kill you. Something like that. And Woods told me to say it. And I hesitated for a minute, and then he said, Say it, Son, and I said it. And then she nodded her head like this.

Q She had not been given any—

GEN. HOLLINS: I object to that as a leading question.

THE COURT: Yes, sir.

MR. WILLIAMS: All right, Had she said anything at all before she asked the police officer to ask you to say those words?

A No, sir.

Q Had she nodded her head at all?

A No, sir.

Q I believe that—I believe that you are—I want to make sure that this is clear—you heard the Prosecutrix' testimony, not only about your being in the house, and had relations with her, but about taking her up the railroad track, and carrying on the act that she said you did there in her home and in the vicinity of Albion and Almeda Streets.

Did you do any of those things?

A No, sir.

Q Cross examine.

CROSS EXAMINATION

[fol. 205] BY GEN. HOLLINS:

Q Mr. Biggers, where were you the day that this rape took place?

A Well, I was home, I guess. I don't really know.

Q You don't know where you were?

A Well, I guess I was home. I don't know no special date, so I don't know whether I was home, or not.

Q Well, where you on the 22nd day of January?

A I keep telling you that I guess I was home. I don't know. I could have been up to the school playing basket-

ball. I don't know. That wasn't no special date or my birthday, or anything. I don't know.

Q Well, do you know what day of the week that was?

A No.

Q Do you remember what the weather was like that day?

A No, sir.

Q Or how you were dressed that day?

A No, sir.

Q You don't know who you were with that day?

A No, sir, I told you it wasn't—I

Q I told you it wasn't my birthday, or anything.

Q You recognize the diagram here on the board?

[fol. 206] A No, sir, I don't.

Q Well, this is the railroad track right here. This is Almeda Street. Albion Street. Meharry Boulevard. Do you recognize that now?

A No, sir, I don't.

Q Well, come down here and look at it a little bit more.

THE COURT: The question is, Do you know that section? Of course you can see that on the board.

A No, sir, I don't know. I am not familiar—

Q by THE COURT: You're not?

A No, sir.

GEN. HOLLINS: Well, let me ask you this: That's just two blocks away from where you live, isn't it?

A I do not go over that a way.

Q You don't go over that way?

A No, sir.

Q The railroad track runs right down behind your house? Is that right?

A I do not know whether it does, or not.

Q Why, you—you live on Scoville Street, don't you?

A Yes, sir.

Q That's about two blocks, isn't it, from this lady's house where it happened?

[fol. 207] A I don't know.

Q Well, is it about two blocks of Meharry Boulevard?

A From my house?

Q No. Yeah, your house? Isn't that about two blocks?

A I don't know. I tell you—I don't go over that way.

Q Well, you know where Meharry Boulevard is? That's just two blocks from your house?

A I know where Meharry Hospital is.

MR. LOOBY: Your Honor, please, I objeet to this line of questioning.

THE COURT: It's Cross Examination. Go ahead.

GEN. HOLLINS: What's the next—the next street is Jefferson, isn't it?

A Yes, sir.

Q And then the next one is Meharry?

A I know where Meharry Hospital is. I don't know where Meharry Boulevard is, where that is.

Q Well, what is that next street to Jefferson Street, then? That's just two blocks from where you live, isn't it?

A I don't know, sir.

Q And you're telling this Jury that you don't know [fol. 208] whether the railroad runs behind your house, or not?

A No, sir, I don't.

Q Well, Mr. Biggers, I'll ask you if you can't get on that railroad track right behind your house and walk all the way up here past Meharry, past Almeda, past Albion? on this railroad track and over this trestle?

A I do not know.

Q Well, what is behind your house?

A Jewel Academy.

Q What?

A Jewel Academy.

Q What street?

A There's nothing but Jewel. We live, I think, out there about the 5th house before the dead end, dead end street.

Q Well, where does the railroad track go back there?

A I do not know if it—if it is a railroad track back there. I do know we live right down the street from Jewel Academy. I do know that.

Q Who lives there in the house with you?

A My mother and father.

Q Anybody else?

A My auntie comes and stays onece in a while.

[fol. 209] Q Well, is there a house behind your house? or a lot? or what is behind your house?

A Uh—uh—yes, sir.

Q What's behind that?

A Behind his house?

Q Yes?

A A basketball rim.

Q A what?

A Basketball rim.

THE COURT: A basketball ring?

A Where you dodge—you know, a basketball rim.

THE COURT: A basketball ring? Is that what you are saying?

A Rim. You know,—

THE COURT: A basketball rim.

GEN. HOLLINS: There's no street back there? or alley? no nothing?

A Oh, yeah, there's an alley back there behind our house.

Q I'll ask you doesn't the alley carry you up on the railroad track?

A No, it do not. It runs back straight to Jewel Academy, cause when the garbage man come to pick up garbage, he have to go in Jewel Academy, and come right [fol. 210] back out. See? the same way.

Q Do you work anywhere? Did you work anywhere?

A Yes, sir. work at Red Ace Service Station on 8th Avenue, South.

Q Are you a service station attendant?

A Yes, sir.

Q How do you get over there? when you went?

A With my father. Step-father.

Q What route did you take when you went over there?

A All I know we went out Jefferson Street. I know that.

Q Are you telling this Jury you have never been two blocks from where your house is over in this area?

A No, sir.

Q Well, isn't there a little store down here?

A I do not know.

Q Well, I'll ask you if Meharry Hospital isn't right over here? You know where Meharry Hospital is?

A Yeah, I know where Meharry Hospital is.

Q I want to ask you if this railroad doesn't run down behind Meharry Hospital?

A I don't know.

Q Have you ever been over there?

[fol. 211] A Yes, sir.

Q But you never have seen the railroad?

A No, sir.

Q Well, I'll ask you if there's not a lot of undergrowth —foliage, and that sort of thing—up here in this area?

A Well, I tell you I do not know. I have never been over there.

Q How long have you worked for this Red Ace place?

A I started in—I think it was April or May one.

Q Sir?

A It was April or May one, when I start.

Q How—how tall are you?

A I guess about 5 feet, 9, or 6 feet—something like that.

Q About how much do you weigh?

A About 200, or 198—something like that.

Q About what size suit do you wear—coat?

A I don't know. I don't buy 'em.

Q What about your hat? Do you know what size hat you wear?

MR. LOOBY: Your Honor, I don't see how all this is—

GEN. HOLLINS: (talks on while Mr. Looby is talking)

[fol. 212] MR. LOOBY: —material to this case.

THE COURT: Yes, I think it's proper. Go ahead—

GEN. HOLLINS: (interrupts) You haven't started shaving yet, have you?

A No, sir.

Q Got a smooth face?

A (starts to say something)

Q Smooth face? Real smooth?

A I guess it is.

Q Yes, sir?

MR. WILLIAMS: Well, may it please the Court, I object to that. If Counsel will go up there and get close to him, he can see where he has begun to develop quite a bit.

GEN. HOLLINS: Now, I object to that. Now, we'll examine Mr. Williams if he's going to testify.

MR. WILLIAMS: Your Honor, he ought not to ask the witness questions like that, then, your Honor.

THE COURT: Just a minute, Gentlemen. He asked the Defendant if he was old enough to shave, and he said, No, that he hadn't started shaving yet, that he had a smooth face. I think the Defendant knows—the witness knows whether he is shaving. Go ahead, sir.

GEN. HOLLINS: And you are telling this Jury that you never have seen this—

A At Juvenile, yes. At Juvenile.

Q When was that?

[fol. 213] A I don't know. Sometime they brought me up there—up to the jail, sometime after that.

Q Are you saying that you saw her both at Juvenile Court and then over here where she identified you?

A I saw her at Juvenile. First, I saw her at—at Police Headquarters, and then I saw her at Juvenile when they brought me over there—at Juvenile headquarters.

Q You are talking about when you were bound over to Criminal Court from Juvenile Court?

A Yes, sir.

Q Can you tell this Jury any reason, why this woman has, to say that it was you?

MR. WILLIAMS: That is objected to, if your Honor please. He can't know what's in her heart.

THE COURT: If he knows? If he knows of any reason, he could answer.

MR. WILLIAMS: Well, he didn't ask him that, though, if your Honor please. He asked him can he tell the Jury. That's—that's how he did it. That's entirely different. Or whether he knows any reason?

GEN. HOLLINS: I'll withdraw that question. Do you know of any reason, yourself, that this woman has, to say that you were the one that raped her?

A No, sir, I don't.

Q Has your voice always been about like it is [fol. 214] now?
A Yeah, I guess so. I don't—
Q Your voice hasn't changed yet?
A (hesitates)
Q Hasn't got deep yet?
MR. WILLIAMS: Well, that's objected to. Counsel is now trying to get into the record this—
THE COURT: Just a minute. The witness said, that he guessed it is. He doesn't know. That's as far—as it goes.
GEN. HOLLINS: Do you know whether you even stayed at home that night? or not?
A No, sir, I don't. I really don't.
Q Do you know how you were dressed that night?
A No, I don't.
Q At that time did you own a short-sleeved sports shirt?
A Oh, I have a whole lot of short-sleeved shirts.
Q At that time did you own some dark trousers?
MR. WILLIAMS: We will stipulate, if your Honor please—
GEN. HOLLINS: Well, now, I want to ask him. Mr. Williams hasn't got any right—
THE COURT: Never mind. Never mind. The witness can answer the question.
MR. LOOBY: If your Honor please, I resent the At- [fol. 215] torney General raises his voice. He doesn't think everybody should—
THE COURT: (raps with gavel) Gentlemen, both sides have raised their voices. Let's proceed with the lawsuit, and the witness can testify, Do you own a pair of dark trousers?
MR. WILLIAMS: May it please the Court, may I interpose an objection?
THE COURT: Yes, sir.
MR. WILLIAMS: For the record.
THE COURT: Yes, sir.
MR. WILLIAMS: I should like to object to this question because it is entirely irrelevant whether or not he

owns a pair of dark trousers. This is without any evidentiary or probated value whatsoever.

And, further, if the Court please, although the Court has indicated that both sides have shouted, I would like to indicate to the Court that, as long as the Court permits—if the Court permits the Attorney General to continue shouting at me, I have no recourse but to try to outshout him.

THE COURT: Well, I've been rather patient with both sides, Gentlemen. We will have no more speeches. We will proceed and I overrule your objection, and note an exception to it. Go ahead.

GEN. HOLLINS: Do you know what the weather conditions were that night?

A (hesitates)

[fol. 216] Q Do you know whether it was cold? or warm? or what?

MR. LOOBY: Your Honor, please, that question is objected to as repetitious.

THE COURT: Yes, it has been asked.

GEN. HOLLINS: Now, Mr. Biggers—I am going to ask you if you don't have an unusual interest in women?

MR. WILLIAMS: That's objected to, if your Honor please, as being incompetent, and immaterial, and not at issue in this case.

THE COURT: Overrule your objection, and note an exception.

GEN. HOLLINS: I will ask you if you don't have more than the average urge to have relations with women?

MR. LOOBY: I am going to object to that, if your Honor please. That should not be considered "more than the average urge." There is no standard by which this may be—this question may be answered.

GEN. HOLLINS: All right, sir, I'll rephrase—

THE COURT: I sustain your objection.

GEN. HOLLINS: I will ask you if you don't have an urge that you can't control to have relations with women?

A No, I do not.

Q I will ask you if you don't have at your home a lot of literature—

[fol. 217] MR. WILLIAMS: Well, now, this is highly improper, if your Honor please.

THE COURT: Yes, I sustain the objection.

GEN. HOLLINS: That's all.

THE COURT: Any further questions?

MR. WILLIAMS: Come down. Your Honor please—

THE COURT: Come down. Your next witness.

MR. WILLIAMS: —we would like to ask the Court to disregard—to instruct the Jury to disregard the questions of the Attorney General as to which the Court has just sustained the—

THE COURT: Yes, Members of the Jury, you will disregard the last question relative to literature. It must not be considered under any circumstances. It is not proper, and do not consider it.

Further the Defendant testified not.

* * * *

MR. WILLIAMS: I would like to call Mrs. Marie Hammonds.

MRS. MARIE HAMMONDS, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

[fol. 218] Q This is Mrs. Marie Biggers Hammonds?

A Right.

Q Mrs. Biggers,—uh—Mrs. Hammonds, where do you live?

A At 2106A Scoville Street.

Q How long have you lived there?

A Approximately 6 years.

Q And are you the mother of this Defendant, Archie Nathaniel Biggers?

A I am.

Q I believe you and his father are divorced, are you not?

A That's right.

Q Who has had the custody of this boy?
A I have.
Q And you have the custody now, I believe?
A That's right.
Q Where was he born?
A He was born in Hopkinsville, Kentucky.
Q When? W-h-e-n?
A When? January 14, 1949.
Q Mrs. Biggers, what has been and are the habits of your son, with respect to staying at home, or running around?
A He just stayed at home. I couldn't get him to leave home.
[fol. 219] Q What about in the nighttime—about 9:00 o'clock in the evening?
A He usually just stayed at home night and day—watching TV.
Q He had been going through that stage—
A That's right. I just couldn't get him to leave, no matter what we did. We tried, but I just couldn't get him out.
Q Has he been a good boy?
A He have.
Q In that connection, prior to these charges having been made against him, had he ever been in Juvenile Court?
GEN. HOLLINS: That's not a proper question.
THE COURT: I sustain the objection. It's really not proper, Gentlemen.
MR. WILLIAMS: Well, had he been in any trouble?
A None whatsoever.
Q Now, Mrs. Hammonds, prior to the arrest of your son, in August, 1965, did you ever have any complaint of anybody about—
GEN. HOLLINS: Objection to that.
MR. WILLIAMS: —that kind of thing?
GEN. HOLLINS: That is a leading question, and would have no—
THE COURT: No, I think it's a proper question,

[fol. 220] under the circumstances.

A No, I never had any complaint, or anything, from anybody.

THE COURT: All right.

MR. WILLIAMS: That's all.

CROSS EXAMINATION

BY GEN. HOLLINS:

Q Mrs. Hammonds, do you know the diagram drawn on the board there of this area?

A No.

Q Are you familiar with this area—Meharry Boulevard, Almeda, and Albion? Are you familiar with that? that general area there?

A Not too well—Almeda and Albion.

Q Well, are you familiar with Meharry Boulevard?

A Um—yeah. More so than Almeda and Albion.

Q Then after Meharry, the first street is Jefferson? Is that right?

A One back toward Scoville it is.

Q And is Scoville the next street?

A Toward Meharry.

Q In other words, if there were enough streets on here we could write Jefferson in here, and Scoville out here?

[fol. 221] A That's right.

Q And you all live on Scoville?

A Right.

Q And that's about 2 blocks from Meharry Boulevard?

A Well, it's three counting my house.

Q Yes, ma'am, two blocks from Meharry?

A It's Meharry, Jefferson and Scoville. Right.

Q Now, does this railroad go down behind your house? or does your house face the railroad track? or what?

A My house faces Jefferson Street.

Q Do you know whether the railroad tracks come down and go across Scoville?

A Across? They don't cross Scoville.

Q Don't cross Scoville? Where do the railroad tracks start?

A See the railroad track coming across Fairway Street gets on Hammonds Street way down—a good piece down from us, but it doesn't cross Scoville. Scoville is a dead-end street.

Q But it does cross Meharry? I take it.

A Yeah.

Q Is that right?

A It's the overhead at Meharry.

Q And it does cross Almeda Street?

A I am not sure about Almeda—I am not too sure about any of 'em.

[fol. 222] Q Jefferson is the next street—does the railroad track cross Jefferson?

A It's overhead at Jefferson.

Q And that's how far from Scoville Street? One block?

A Yeah.

Q What happens to the railroad after it gets to Jefferson Street?

A All I know is it's overhead, and keeps overhead, I guess. I don't know what happens to it.

Q Well, does it keep going, generally, in this same direction?

A Well—

MR. WILLIAMS: Your Honor, I object. If your Honor please, she says she doesn't know what happens to it.

THE COURT: She says that she doesn't really know where it goes. This is cross examination.

GEN. HOLLINS: Do you know whether or not it continues on in this same direction?

A As far as I know, it does, but as far as I know definitely is Jefferson Street. I can tell you it's overhead, at Jefferson, and it's overhead at Meharry and that's as far as I can definitely tell.

Q But you don't know what happens between Jefferson and Scoville?

[fol. 223] A It's no railroad between Jefferson and Scoville, because there's no street there to cross. We're on a dead-end street.

Q Did you ever have occasion to be on this railroad track, for any reason?

A None whatsoever.

Q And so where you live is about how far from where the railroad track goes over Jefferson? about a block?

A Uh—I guess. I guess, I am not sure on that.

Q You say this son never leaves home? He goes to work every day at the filling station, doesn't he?

A He did not start to work until the first of June, 1965, of this year, when we first got him out of the house.

Q When was that?

A The first of June, 1965 of this year.

Q He wasn't working until then?

A He was not working at the service station. He wasn't working anywhere.

Q Do you work anywhere?

A That's right.

Q Where do you work?

A Now, I work in Hendersonville.

Q At that time where did you work?

[fol. 224] A In Hendersonville.

Q Were you working there every day?

A Every day except Thursday and Sunday.

Q How would you know whether he was at home, or not?

A What you mean? before June, 1965?

Q Well, you said you work in Hendersonville every day, I understood you to say.

A I do.

Q How would you know—

A He—

Q whether he was at home? How would you know if you were in Hendersonville, whether he was at home?

A I called home. I always called, night and day. I called home.

Q How often did you call?

A All through the day.

Q How did you space the time?

A I didn't space the time.

Q Ma'am?

A I just called whenever I got ready. I called and checked on him to see was he at home, to see was he all right. He did me that-a way. If I was at work, he called

me, he checked on me to see was I all right. We did each other that-a-way. This was our way of doing.

[fol. 225] Q Do you know about how many times you called a day?

A No. I can't tell you exactly how many times. I'd just call all through the day. There'd be something I'd want him to put on for supper. I'd call him and tell him to put such and such a thing on for supper.

Q Why was it necessary for you to check on him that much every day?

A That was just a habit we have. He was afraid something was going to happen to me, and so we just checked on each other so he'd know I was all right. I always did that.

Q Were you afraid something was going to happen to him?

A No, he was afraid something was going to happen to me. He called me all through the day that-a-way.

Q Well, the woman—who did you work for at Hendersonville?

A Now I work for Mrs. Mildred Woolwine.

Q Who did you work for at that time at Hendersonville?

A Mildred Woolwine.

Q Mildred Woolwine?

A Uh-huh.

Q Do you know what her address was out there?

[fol. 226] A It is now where I work for. In January, I worked for Dr. Classen.

Q Dr. who?

A Classen. C-l-a-s-s-e-n.

Q Where is he?

A And my hours were from 6:00 to 2:00,—from 6:30 to 2:00.

Q 6:30 in the morning till 2:00 o'clock?

A Till 2:00 in the afternoon.

Q Where is his office?

A It was at 4—4 something, I have forgotten the address, but it is on West Hillwood Boulevard.

Q And he didn't object to all these telephone calls?

A They wasn't there. They couldn't. They're both doctors.

Q Well, would you call him once an hour?

A Well, just—I can't tell you how—every time I called him—all I can tell you, I called him all through the day. And, every time I am away from home, I checked on him, and he checked on me, that's just the way—our rules.

Q Day in and day out?

A That's right. Every—

Q 365 days a year?

A Every single day and night. That's just our [fol. 227] rules.

Q And you can't tell the Jury why you have that rule?

A Well, he was just afraid something was going to happen to me, and I was always calling him to let him know I was all right, and checked on him at home. That was our rule.

Q What was he afraid was going to happen to you?

A To me?

Q Yes, ma'am?

A Well, he heard my father say if I ever divorced him, he'd kill me.

Q I see.

A And he just said that if he didn't do it, he may have some of his friends to do it.

Q Has he ever offered to do you any harm since you were divorced?

A No.

MR. LOOBY: May your Honor please, I don't see the materiality of this—

GEN. HOLLINS: She brought that up herself, so that was the reason—

MR. LOOBY: I'm addressing the Court.

THE COURT: Yes, it's in connection with why she called. That's her explanation of why she does all of this—

[fol. 228] GEN. HOLLINS: Has he ever offered to do you any harm?

A Not after we was divorced.

Q How long have you been divorced?

A Almost two years,—about a year and a half, really. It's almost two years.

Q (not understandable on the record)

A We have kept it up every day. That's just a habit we have. Before we separated, I did, and after I sep—after we was divorced, we did it. It is just our habit.

Q Well, you are not telling this Jury that you stayed home every night, are you?

A When I went to choir rehearsal, I had to call Nathaniel when I got to choir rehearsal, and let him know I made it all right. And if I stayed—after I stayed a while, he would either call me, or I would call him. That's just our habit.

Q In other words, you would just quit singing, and go call him?

A He would call—if he didn't call me, I would call him, and tell him that I were all right, and what time I'd be home.

Q Well, you reckon you must have placed 20 or 30 calls each day—

A I am not sure how many. All I can tell you is I called back and forth home.

Q Suppose you went to a picture show? Would you [fol. 229] call him?

A I never went to a picture show.

MR. LOOBY: If your Honor please,—

A I don't know what it is to go to a picture show. I haven't been to a picture show in years.

THE COURT: We are getting far afield.

GEN. HOLLINS: Well, what did you do at night? other than this

A Nothing. I never did anything except choir rehearsal. That's the only thing I ever went to. Unless I were going to church, I never went anywhere at night.

Q What nights did you go to choir rehearsal?

A On Wednesday night.

Q What did you do on February 22nd of this year?

A I can't remember exactly what happened on that date. I can not tell.

Q Well, what—

A That was on Friday night and I don't go anywhere, usually, on Friday night, for I looked at the calendar to see what night it was on.

Q Were you over there at your house?

A I can not tell you exactly what happened that day.

Q Can you tell us whether your son was there, or not? remember you are under oath.

[fol. 230] A Definitely, I can not say. I can not specify one day.

Q That's all.

THE COURT: Any further questions?

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q But you do know that he was generally at home—

GEN HOLLINS: I object to that as a leading question—

A He was there—he was there all the time, we couldn't get him to leave at all whatsoever.

MR. WILLIAMS: Come down, Mrs.—

RECROSS EXAMINATION

BY GEN. HOLLINS:

Q One more question, since he has asked you that last question: You, on your oath, can here today—can you state, under your oath, that he was there on January the 22nd?

A As far as I know, he was, cause that's during the time we could not get him to leave home.

Q I say, could you answer this a while ago?

A That's what I'm telling you—as far as I know, [fol. 231] that's all I can tell you, cause we could not—that's during the time we could not get his out of that house, night or day, but I have worried with him trying to get him to go out.

THE COURT: Listen to his question.

GEN. HOLLINS: Under your oath, can you say definitely to this Jury he was there at any certain time on January 22nd, at night?

A Definitely, I—I—all I can say—
Q Just tell the Jury,—
A —is that during the time—
Q Yes, or No?
A Huh?
Q Can you answer that—can you state definitely that he was there at 9:00 or 9:30 that night?
A As far as I know, he was. That's all I can tell you, cause that's during the time we couldn't get him away from home.
Q Do you have any specific recollection of him being there at that time?
A I can't—I just can't specify about what happened any certain date, but all I can is that's during the time we couldn't get him to leave home.
THE COURT: Any further questions? Gentlemen?
MR. LOOBY: No, sir.
THE COURT: That's all. You may come down.
[fol. 232] Further this witness testified not.

* * * *

MR. LOOBY: Call Mrs. Ambrose.
THE COURT: Gentlemen, it's 12:30, and lunch has been ordered for the Jury. Members of the Jury, you may —your lunch—hour—we will now recess for lunch. It's 12:30. The Officers will take the Jury to lunch.

(The Jury leaves the courtroom for lunch)

(Witnesses are brought in)

THE COURT: We will now recess for lunch. The Court will now instruct each of you to be back in the witness room that you were in a moment ago at 1:30. Do not discuss this case with anyone, among yourselves, no one except the attorneys for the State and for the Defendant. Be back in the Jury room—the witness room at 1:30. You may pass on out.

(Witnesses pass out of courtroom)

THE COURT: We will recess for lunch and be back at 1:30.

(Lunch hour is had from 12:30 to 1:30)

AFTERNOON SESSION

THE COURT: Are you ready, Gentlemen? your next witness?

MR. LOOBY: Yes, sir.

MR. WILLIAMS: The Defendant calls Mr. Bassie Hammonds, your Honor.

THE COURT: Mr. Hammonds.

[fol. 233] BASSIE HAMMONDS, Jr., called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q State your name, sir.
A Bassie Hammonds, Jr.
Q And where do you live?
A 2106 Scoville.
Q You are the step-father of this Defendant?
A Yes, sir.
Q And he has been residing with you how long?
A About a year and a half.
Q All right, sir. Now, Mr. Hammonds, have you had occasion to regard his habits, with regard to staying at home? or running around?
A Yes, sir.
Q What are those habits? What—what are those habits?
A Well, he stayed at home of the time cause we couldn't get him to go anywhere.
Q Mr. Hammonds, do you know his rep—do you know and have you had a chance to observe his reputation there in the community where he lives for truth and veracity?
[fol. 234] A Yes.
Q You know what reputation is? what other people say about him?
A Yes.
Q Is that reputation good or bad?
A Good.

Q Have you—has he always been an obedient boy as far as you are concerned, since you have had him?

A Yes.

Q All right. Have you—do you know his reputation in the commutity where he lives for obedience and good character?

A Good.

Q Is that reputation good or bad?

A Yes.

Q In your opinion, is his testimony entitled to full faith and credit in a court of law?

A Yes, sir.

Q Have you had any trouble at all with that boy?

A No, sir.

Q Have you ever heard of him being in trouble?

A No.

Q Cross examine.

[Tol. 235]

CROSS EXAMINATION

BY GEN. HOLLINS:

Q Mr. Hammonds, why was it that this boy never did go anywhere?

A Well, at first he said—uh—his breath smelled.

Q All right. Is that the reason he never did go anywhere?

A Yes, sir. He—uh—and he also said he was overlarge for his age.

Q What about—was he employed somewhere?

A At—at first, he wasn't when I first met him.

Q Well, when was he employed?

A He started to work last June. He was working since last June.

Q Well, where was he employed?

A Brooks Red Ace Service Station.

Q And he worked there pretty regular?

A Yes, sir.

Q Now, during this time—during that period of time, were you working?

A Yes, sir.

Q Where were you working?
A Working at the same place—Brooks Red Ace.
[fol. 236] Q Well, you had occasion to see him down there—did he work there every day?
A He went with me and he came with me.
Q What route did you take to go there?
A I went through 18th to Meharry Boulevard.
Q Went down Meharry Boulevard?
A I went through 18th to Meharry Boulevard.
Q Then where did you turn off on Meharry Boulevard?
A Turned left.
Q You did that every day? Is that right?
A Yes, sir.
Q Would you look over here at this diagram, Mr. Hammonds? This is Meharry Boulevard, right here. This is Almeda. This is Albion. Are you acquainted with that area pretty well?
A Yes, sir.
Q Do you know where those streets are?
A Yes, sir.
Q All right. The next street down below here from Meharry would be Jefferson? Is that right? going down?
A Coming this way? Yes.
Q And the one after that would be Scoville? Is that right?
A That's right.
[fol. 237] Q And you all live on Scoville Street?
A Yes, sir.
Q Isn't that about two blocks from Meharry Boulevard?
A That's right.
Q And you all would come—
A We would go up 18th to Meharry.
Q Uh-huh?
A And would turn left on Meharry, and go to 17th.
Q You did that every day?
A Yes.
Q Now, are you acquainted with these railroad tracks that run behind—across Meharry to Almeda and Albion—the overpass, sir?
A Uh—I know where Almeda goes through there. where it goes to there.

Q You know where it goes over Meharry?
A Where the railroad goes over Meharry?
Q You know where it goes over Jefferson?
A Yes, sir.
Q Well, does it go over Scoville, too?
A I don't remember. I've never been back down there, —on Scoville. See we live on a dead-end, and I have never been no further down.
[fol. 238] Q All right. Well, how far is your house from Meharry Boulevard? Two blocks?
A It's a block to 18th. And then 2 blocks over to Meharry.
Q Have you, yourself, ever been up on this railroad?
A No, sir.
Q Never have? Are you familiar with where this lady, Mrs. Beamer, lives? on Meharry Boulevard, that is, at 2319, do you know where that would be?
A Not exactly, no, sir.
Q What about your wife, Mr. Hammonds? Was she working during that time?
A Yes, sir.
Q Where was she working?
A At which time do you mean? was she working?
Q Well, where was she working in January of this year?
A She was working in—uh—Belle Meade.
Q Do you know who she was working for?
A I can't remember exactly the name, the lady's name.
Q How long did she work for her?
A I don't remember just how long it was. It wasn't too long, after that.
[fol. 239] Q Who did she go to work for then?
A She went to work over in West Meade after she left there.
Q Do you know who she worked for there?
A No, sir, it was a doctor, but I don't know his name.
Q Then who did she work for after that?
A Well, she worked for the same place she work at the present time, in Hendersonville.
Q I see. What hours did she work?
A At—

Q Do you know?

A Not exactly, no.

Q Well, you'd be—you'd already be gone when she went to work, wouldn't you?

A She would take me to work and then use the car.

Q Did—did you and your wife ever go out any at night?

A I'd take her to choir rehearsal.

Q When was that?

A On Wednesday night.

Q Did you do anything else beside that—to go out at night? go to the picture show? or anything like most people do?

[fol. 240] A No, sir. We'd go to church on Sunday night, cause I worked on Sundays, and we'd go to church that night.

Q I see. And would Mr. Biggers go with you?

A No, sir.

Q Do you ever recall your wife calling home? or him calling her? when you all were out together?

A Yes, sir.

Q And did this happen all the time?

A Yes, sir.

Q What was the reason for that, Mr. Hammonds?

A He always seemed concerned about her. And he would always call when she got there, where she would tell him she was going.

Q Would he call her? or would she call him?

A Well, most times when she would get there, she would call him to let him know that she made it o.k.

Q You would have told us that he always stayed home? Is that right?

A Unless—sometimes you could get him to go to the store. We couldn't hardly get him out of the house. Day or night.

Q Well, if he was always at home, what reason would she have to call him?

A Well, that was his suggestion. He would always have her to call him to let him know she made it o.k.

[fol. 241] Q Well, how long—how often would she call?
A It depended on how long she stayed.
Q Well, let's say choir practice.
A Well, she would call when she got there, and if they were going to stay any length of time, she would call again. And then she'd always call when she got ready to leave to come home.
Q To be fair about it, she was calling to see if he was at home, wasn't she?
A No, sir.
Q Were you at home on January 22nd of this year?
A I don't remember.
Q You know what day of the week it was?
A Not exactly, no, sir.
Q Are you able to state to this Jury whether or not this Defendant was at home on the 22nd?
A I don't remember that date, so I couldn't say for sure one way or the other.
Q (hesitates)
THE COURT: Is that all?
GEN. HOLLINS: Just one minute, your Honor. Uh—are you familiar with a little store over there—store or little restaurant? something like that?
A Down on the corner by the—before the stop-[fol. 242] sign?
Q Just past the railroad?
THE COURT: Well, for the sake of the record, that's White's Market—White's Store. I believe it's in the record—so he will know which store you are talking about. Was it White's Store? or White's Drive-in?
GEN. HOLLINS: White's Lunch Room.
THE COURT: White's Lunch Room, for the sake of the record.
GEN. HOLLINS: Do you know where White's Lunch Room is, on Meharry?
A I know where a restaurant is on Meharry. I don't know the name of it.
Q Well, is it on the right? or on the left?
A It's on the right going out.
Q How far is that from your house?
A (hesitates)

Q Two blocks? or something like that?
A It would be two blocks, from—It is in the middle of the second block down from 18th.
Q About two blocks down—
A This one I am thinking about.
Q Do you go by that every day when you go to your filling station?
A No, sir. That's to the right off of 18th.
[fol. 243] THE COURT: Is that all, General?
GEN. HOLLINS: Yes, sir.
THE COURT: Any further questions, Mr. Williams?
MR. WILLIAMS: Your Honor, please, could I have just a—

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q Mr.—Mr. Hammonds, what this next street—what's this street above the railroad track? or do you know?
A Uh—
Q You know the street where Brown's # 3 used to be there on Meharry Boulevard?
A No, sir, I don't remember what street that was.
Q But it was not 18th, was it?
A No, sir.
Q In fact, isn't it 21st?
GEN. HOLLINS: Now, I object to that. That is a leading question.
MR. WILLIAMS: All right. Counsel wants to mislead the Jury.

(confusion of voices) (Gen. Hollins is talking very loudly)

THE COURT: Now, wait just a minute. Now, wait just a minute. Counsel can refresh his memory if he—can, or not.
MR. WILLIAMS: Is it 21st? or do you know?
GEN. HOLLINS: If your Honor please, I'd like to be heard.
[fol. 244] THE COURT: Now—Just a minute. Do you know?

A 21st is there by the restaurant—just across before the stop sign there by 21st.

GEN. HOLLINS: Now, your Honor please, Mr. Williams has stated that Counsel wants to mislead the Jury. It is not proper, and I ask for instruction on it.

THE COURT: Yes, Members of the Jury, I feel that neither Counsel, intentionally, would mislead this Jury. Gentlemen, there will be no more remarks relative to that type of statement.

Let's move along with this lawsuit.

MR. WILLIAMS: Very well, your Honor.

Now, what is the next street above what you said what it was?

A If I remember, I believe it's 26th, I believe.

Q What street is the—what street is Meharry Medical College on?

A It's on 18th.

Q Now, is Meharry Medical College also on 21st?

A No, sir.

Q It's not on 21st?

A I believe 21st goes to the back of Meharry.

Q That's right. And what goes in front of Meharry?

A 18th.

Q All right. And does Meharry Boulevard intersect [fol. 245] those two streets?

A Yes, sir.

Q This street up there then—the first street—would be what?

A 21st.

Q And then you have what this street?

A Meharry.

Q And then what?

A 18th.

Q And then,—now, in a northerly direction, Counsel was absolutely correct—the next street over running parallel to Meharry is Jefferson, is it not?

A That's right.

Q And the next street running parallel to Jefferson is Scoville, the street you live on?

A That's right.

Q What—let me ask you this: does 21st go across Jefferson when you walk down or drive down 21st?

A No, sir.

Q There at Meharry Boulevard and get to Jefferson, does 21st go on across to Scoville?

A No, sir.

Q It's dead-end there at Jefferson?

A That's right.

Q How far—how far is it, in a westerly direction that you have to drive on Jefferson before you get to a street [fol. 246] that crosses over in a northerly direction to Scoville?

A 18th.

Q Well, that's in an easterly direction.

A Right.

Q (talks and it is not understandable because Gen. Hollins talks at the same time)

THE COURT: (to Gen. Hollins) No. (to Mr. Williams) Go ahead.

MR. WILLIAMS: If the Court please—

THE COURT: Never mind, General. Go ahead, Mr. Williams.

MR. WILLIAMS: How far in a westerly direction?

A To get to a street to go all the way over there?

Q To get to a street that goes all the way down to Scoville?

A 26th.

Q All right. Now, then, and you have indicated already that Scoville dead ends—Scoville itself dead-ends as you come down from 18th? Isn't that right?

A That's right.

Q So that when you want to get to Jefferson from Scoville, from your house on Scoville, what—tell the Court and the Jury what you have to do on Scoville? tell the Court and Jury what you have to do?

A I have to come back up Scoville to 18th.

[fol. 247] Q In which direction? Toward the river? or toward A & I?

A Going toward the river.

Q All right.

A Go to 18th and turn right and go one block up to Jefferson.

A All right.

Q That's two blocks you've traveled already? Is that right?

A That's right.

Q And then what do you have to do to get down to this railroad track?

A Turn right on Jefferson.

Q All right. And you go down to where?

A 21st.

Q All right. That's the third block. Now, is that a short block? or is that a long block? between 18th and 21st?

A That's a short block.

Q That's a short block between 18th and 21st?

GEN. HOLLINS: He's cross examining his own witness.

THE COURT: Yes, he said it was a short block.

MR. WILLIAMS: You think it's a short block?

THE COURT: He has answered it. He said it was a short block.

[fol. 248] MR. WILLIAMS: All right. Anyway, that's the third block?

A Yes, sir.

Q Then what do you have to do?

A Turn left on 21st, and go up to Meharry.

Q All right. That's the fourth block?

A Yes, sir.

Q Right?

A Yes, sir.

Q Then what do you have to do?

A Turn right on Meharry.

Q All right.

A And go to the railroad tracks.

Q All right. So, that, in order that Counsel—and I know, in order to have the record, actually you have at least five blocks to go from your house down to the railroad trestle?

A Yes, sir.

Q Yes, sir? All right.

THE COURT: Is that all, Gentlemen?

GEN. HOLLINS: No, sir.

RECROSS EXAMINATION

BY GEN. HOLLINS:

Q Mr. Williams said you had to drive—you could walk over there a whole lot easier than that, can't you, in about [fol. 249] two blocks?

A Sir?

Q You could walk over there in less than that? in about two blocks, couldn't you?

A If you want to cut through somebody's yards. Or something.

THE COURT: Is that all, Gentlemen?

GEN. HOLLINS: Yes.

THE COURT: You may come down and have a seat in the courtroom.

Further this witness testified not.

* * * *

THE COURT: Your next witness, please.

MR. WILLIAMS: Call Mrs. Edna Jones.

MRS. EDNA JONES, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q You are Mrs. Edna Jones?

A Yes.

Q Mrs. Jones, I believe you reside at 1421 Otay Street?

[fol. 250] A That's right.

Q And in what part of town is that located?

A That's East Nashville.

Q How long have you lived there?

A Oh, about 3 years.

Q All right. Prior to that time, where did you live?

A Well, from there I lived on 22nd, right off of Heiman.

Q Yes?

A And then I lived on Noel Street.

Q And these two last locations are what sections of town?

A Well, 22nd is north.

Q All right.

A And also Noel is in north.

Q Now, Mrs. Jones, are you related by blood, marriage—blood or marriage, to the Defendant, Archie Nathaniel Biggers?

A No.

Q Do you know him?

A Yes, I do.

Q How long have you known him?

A Um— about 6 years.

Q How did you come to know him?

[fol. 251] A Well, I used to live next door to him.

Q All right. Did you have any relationships with him?

A Yes, I did. I used to keep him.

Q You would keep him for his mother?

A Yes, I did.

Q Were you caring for—did you know his habits? How old was he at that time?

A He was about 11 or 12.

Q Was he in school?

A Yes.

Q Did you notice his habits in regard to staying at home? or running around?

A I never had a minute's trouble out of him.

Q Did he stay at home?

GEN. HOLLINS: Your Honor, please—

A Yes, he did.

GEN. HOLLINS: I can't see the relevancy of all this.

THE COURT: No, I think that she can testify to what his habits were within a three-year period.

MR. WILLIAMS: Was he an obedient child?

A Yes.

Q Did you notice any character traits about him? Did you notice what his character traits were?

A They were o.k. He liked to eat. (laughs) [fol. 252] When he came in from school, I always tried to have something some food. But other than that, he was a wonderful kid. But he did like to eat.

Q He did like to eat?
A Yes, he did, but he was a good kid.
Q Did he play football in school?
A Not to my knowledge.
Q So he stayed with you? All right. Now, you are familiar with where he lived over there? in North Nashville? are you not?
A Uh-huh.
Q And you know a lot of people over there, don't you?
A Quite a few.
Q Do you know his reputation in that community? for truth and veracity? And reputation is, of course, what you hear people say about them.
A Well, everybody I know that knows him gives him a good name. Good boy!
Q Well, then your answer to my question would be that you do know his reputation? for truth and veracity? Is that correct? Is that reputation good?
A Yes. It's good.
Q Do you likewise know his reputation for obedience and for good character, in general?
[fol. 253] A Wonderful. He obeyed me wonderful.
Q Well, from what you know of his reputation of him now, from what people say about him, is it good or bad?
A It's good.
Q Well, in that community where he is living now, is what people say about him good or bad?
A It's good.
Q Based on your knowledge, then, and based on the reputation that you know about, in your opinion, is his testimony entitled to full faith and credit in a court of law?
A Yes.
Q Have you ever known the child to be in any trouble at all?
A No.
Q Cross examine.

CROSS EXAMINATION

BY GEN. HOLLINS:

Q Mrs. Jones, you haven't kept him in three years, have you?

A No, I haven't—not in three years, I haven't, but I have been in contact with him.

Q How have you been in contact with him? Would it be over at your house?

A Yes, he's been to my house.

[fol. 254] Q On many occasions?

A Not too many. No.

Q When was the last time he was there?

A Last time? The date I can't tell you.

Q Well, about when was it?

A Wait just a minute. I can tell you just about. It's been a good year and a half.

Q And did he come there more frequently a year and a half ago? than he does now?

A No, not where I'm living at now, he didn't, but when he—but when I was living close to 'em, he was there every day.

Q He came here every day?

A When I was close to him, yes.

Q Was he going to school, then?

A Yes, he were.

Q He would just be in after school, I take it?

A I saw him in the morning and in the afternoon. I kept him in the afternoon.

Q I see. Well, he was a small child, wasn't he?

A Yes.

Q Did he play with the children in the neighborhood, and that sort of thing?

A Well, at that time, he played up in my front yard. The kids all gathered in my front yard, back there.

[fol. 255] Q Well, like all children, did he go to the grocery store and drug store and that sort of thing?

A Yes, he went to the grocery store.

Q He didn't stay there all the time in your house?

A At the time I was keeping him, in the evenings he came home, if he went anywhere, he came to me for permission.

Q All right. And you gave him permission to go to the grocery store? and—

A To go to the store, yes. He didn't roam the street, no.

Q And then he'd go by himself? Or did he go with other children?

A Sometime with other kids, yes.

Q Did he visit your home at night?

A I didn't keep him last year.

Q And while he was at your house, some days, did his mother call about him? or did she just have confidence in you to keep him?

A Well, she was a working at night. Yes, she had confidence in me, yes.

Q Ma'am?

A Yes, she had confidence in me.

Q Well, did she call about him? call all hours [fol. 256] of the day?

A No.

Q That's all.

Further this witness testified not.

* * * * *

MR. WILLIAMS: Mrs. Nina Carter.

MRS. NINA CARTER, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q This is Mrs. Nina Carter?

A Yes.

Q Mrs. Carter, I believe you reside at 1004 Acklen Avenue, Nashville, Tennessee. Is that right?

A That's correct.

Q You are a married woman, and have a family—is that correct.

A I'm not married.

Q Oh? You're not? Well, I'm sorry? Miss Carter

A That's true.

Q Miss Carter, how old are you?
A Forty-three.
Q And if I asked that question, before, I thought [fol. 257] it was a dangerous one. Uh—where are you employed?
A Meharry Medical College.
Q In what capacity?
A I'm bookkeeper in the business office.
Q Miss Carter, are you acquainted with the Prosecutrix here, Mrs. Margaret Beamer?
A Yes, I know Mrs. Beamer.
Q Do you consider her a friend of yours? At least you are friendly with her?
A Yes.
Q Well, then, Miss Carter, do you also know the Defendant here, Archie Nathaniel Biggers?
A Yes.
Q How long have you known him?
A I have known Mr. Biggers over a year.
Q Are you acquainted with his mother?
A Yes.
Q Is that how you met him? and became acquainted with Nathaniel?
A Yes.
Q Have you had occasion to observe his habits either for staying at home a great deal or running around?
A Each time that I have talked with him, Mr. Biggers would be in his home.
THE COURT: Speak up louder, please.
[fol. 258] A Each time I have stopped, Mr. Biggers would be in his home, and when I would stop—I work, and it would be at night.
Q You work where?
A I say I work and each time that I have stopped at his home, it would be at night, and I have spoken to him; and asked him to have his mother to call me, when I called.
Q And he would be at home?
A Yes, he would answer the phone. He would always relay the message, cause she would always return my call.

Q And have you been over there on occasions, at his home, and no one would be at home but him? Miss Carter?

A No, I have been over there at night only, I don't have occasion to visit in the day, because I work each day.

Q Yes? Do you know of any trouble that he has ever been in prior to his arrest on this charge?

A I have never heard of any trouble whatsoever.

Q Now, you know that section all right?

A I have visited. Because I don't live north.

Q Now, you have lived in Nashville how many years?

A Thirty something years.

Q Would you say—you have heard people discuss [fol. 259] this young man, have you not?

A Well, I've heard them say he's a nice kid—the folks in the neighborhood.

Q Well, now, everybody wants to tell me what they've heard. All I want is the response that you have heard people discuss it?

A Yes.

Q Do you—do you think, based on these discussions that you know his reputation there in the community where he lives for truth and veracity?

A Yeah.

Q Is that reputation, based on that, good or bad?

A It's good.

Q You think, based on that—do you think you know his reputation in the community where he lives for obedience and good character?

A Yes.

Q Is that reputation good, or bad?

A Good.

Q And would you accord, in your opinion, the testimony of this boy and entitle him to full faith and credit in a court of law? In other words, do you believe he is entitled to belief of his testimony in a court of law?

A Beg your pardon?

[fol. 260] Q Let me answer and put it another way. Are you familiar with the term full faith and credit—are you familiar somewhat with the term full faith and

credit? When you give full faith and credit to something, you give it verity—you believe in it. Do you understand what I mean by full faith and credit now?

A Yes.

Q You must answer because the record can't—can't receive the shaking of your head. Now, based on what you know about the reputation of this young man for truth and veracity, and for good character in the community where he lives, is his testimony given from that stand in this court, in your opinion, entitled to full faith and credit?

A Yes.

Q You say that notwithstanding the fact that you are also a friend of the prosecutrix?

GEN. HOLLINS: That's a leading question, your Honor.

THE COURT: Yes. Is that all?

MR. WILLIAMS: That's all.

THE COURT: Cross examine.

CROSS EXAMINATION

BY GEN. HOLLINS:

Q Miss Carter, you say you've known this Defendant for about a year?

[fol. 261] A Or better.

Q Did you know him on January 22nd, of this year?

A Yes. I did.

Q Did you have occasion to see him on that date?

A On that date?

Q Yes, ma'am?

A I don't recall the date. I don't know what the 22nd was.

Q How many times have you seen him?

A Oh, I can't count the times that I have seen him in over a year. I never kept count or a record of the times.

Q How many—all I am asking you for is your best estimate?

A I just don't—I don't know. I can't say how many times.

Q Where do you figure you have seen him? Have you seen him out on the street and other places?

A I've seen him at home.

Q And that's the only place you've ever seen him?

A Uh-huh. The only place I've seen him is at home.

Q When was the last time you have seen him?

[fol. 262] A I can't recall.

Q Now, you know that—do you know Mrs. Beamer?

A Yes, I know Mrs. Beamer.

Q How long have you known her?

A Mrs. Beamer?

Q Yes, ma'am.

A Oh, I don't know exactly how long, but she is employed at Meharry and I am also, so I couldn't quote the exact number of years or days, that I have known her. I can't think—

Q You have known her for some little period of time?

A Yes. I do.

Q What is your job out there?

A Bookkeeper.

Q I see. Do you think you know her reputation in the community for truth and veracity?

A Well, I'll say I don't know anything wrong about her.

Q Yes, ma'am? And you have known her for all these years?

A I don't know how many years I have known her. She works there as a nurse, and I work as a bookkeeper. And I know Mrs. Beamer as working for the same college.

[fol. 263] Q (not understandable)

A Yeah.

Q And Mr. Williams asked you about Mr. Biggers—do you think she is entitled to full faith and credit on her testimony in a court of law?

A Yes, I would think she is.

Q That's all.

THE COURT: Any further questions, Gentlemen?

A No, sir.

THE COURT: You may step down, and have a seat in the courtroom.

Further this witness testified not.

* * * *

THE COURT: Next witness, please.
MR. WILLIAMS: Mrs. Allie Fisher.

MRS. ALLIE FISHER, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Mrs. Fisher, give us your name and address, please, ma'am.

A Mrs. Allie Fisher, Allie B. Fisher, 1505 [fol. 264] 24th Avenue, North.

Q Is it Mrs. Fisher? Mrs. Allie Fisher?

A Uh-huh.

Q Mrs. Fisher, you are over 21, aren't you?

A Yes, sir.

Q All right. Do you know the Defendant, Archie Nathaniel Biggers?

A Yes, sir.

Q How long have you known him?

A Well, I've been knowing him—oh, about 2 years, or longer.

Q All right. How did you happen to become acquainted with him?

A Well, I met him; and after we met, why his mother was a good friend, and we would call each other.

Q Did you visit there frequently?

A Yes, I visited them.

Q Uh—are you familiar with—Mrs. Fisher, are you acquainted, or did you observe any patterns of the Defendant during your acquaintance with him in regard to whether he would stay at home, or run around?

A Well, yes, to may knowing, I have never known him to run around or anything, and I never knowed him being in any trouble before of any kind and I called his mother day or night, and he would always be there and answer the phone.

[fol. 265] Q Was he there an unusual amount for a young man to be?

A Sir?

Q Was he—did he stay at home an unusual amount of time?

A Well, sir—

Q —for a young man?

A Yes, he certainly did.

Q Did you ever know, or hear of him being in any trouble at all?

A Never did.

Q Were you surprised when you heard that this—

GEN. HOLLINS: (objects)

THE COURT: Members of the Jury, you will disregard that last question and answer, and not consider it under any circumstances.

MR. WILLIAMS: I don't believe you live in the neighborhood, Mrs. Fisher, that they live?

A No, I don't.

Q So that you don't—I believe you told me you don't know his reputation in the community? In other words, you haven't heard anybody else talk about it?

A No, sir. No, sir.

Q I except, if your Honor please. We do except to the Court's ruling. You sustained the objection to the question that was asked.

[fol. 266] THE COURT: Note an exception to the last statement.

MR. WILLIAMS: Yes, sir.

THE COURT: Is that all?

MR. WILLIAMS: I would like to ask you this: Your testimony, then, that you have given is based on your personal knowledge and acquaintanceship with this Defendant and his mother?

A That's right.

Q And have those associations that you have had with them been—or have they just been a year or so? Have they been on a daily, or weekly, or monthly basis? That you have his mother, or visited his home, or called his mother, or telephoned them, or had some kind of social intercourse with them?

A Yes, I would pick up the phone and call her.

THE COURT: Well, has it been frequently? That's what he is talking about.

MR. WILLIAMS: Has it been frequent?
A Uh—
Q By frequent I mean happening regularly.
A Oh, yes, she calls me.
Q At intervals close together?
A Yes, yes, I understand you now.
Q Cross examine.

CROSS EXAMINATION

BY GEN. HOLLINS:

[fol. 267] Q Mrs. Fisher, when was the last time you went over there?
A Well, I hadn't been over there, oh, in a couple of months.
Q Well, do you remember specifically when the last time was?
A No, I couldn't remember.
Q How many times have you been over there this year?
A I don't know whether I've been over there this year, or not.
Q Do you mean in 1965?
A Uh-huh.
Q You don't—
A She just usually calls me, and I call her or probably if I get in early from church, I run by her house a few minutes, or she comes running up to my house.
Q And you probably haven't been over there all year?
A I can't remember.
Q Well, does he ever visit you over there?
A Well, he comes sometimes with his mother.
Q Well, when was the last time he was over there with his mother?
A Well, he hadn't been over this year with his mother. I can't remember—the last time—
[fol. 268] Q So, you haven't seen either one of them—in about 11 months?
A Well, I feel—
Q Or do you remember?

A Let's see—I saw—I talked to his mother, but I haven't been over there, but we talked. But I can't remember the last time I have been over there.

Q Actually,—

A But I think I have been over there this year.

Q —then, the only thing you know about his habits are what his mother told you? Isn't it?

A No, fur as I know of him, I have never knowed of him being in any trouble, any 'fore—any kind of trouble, and when I would call his mother, he would always answer the phone. Day or night.

Q Well, from what he had told you, and from what his mother had told you, how did you have any occasion to observe—how did you know anything about him other than what his mother told you? during the last year?

A Well, I hadn't seen her. We just talked—we would.

Q But I say the only way you could get any information was to talk to him or his mother? Isn't that right?

MR. WILLIAMS: That is objected to as being argumentative, your Honor.

THE COURT: Yes, it's repetitious. She's already answered that she hadn't seen him—she just talked to to him on the phone.

[fol. 269] GEN. HOLLINS: That's all.

MR. WILLIAMS: Come down, Mrs. Fisher.

THE COURT: You may come down and have a seat in the courtroom, please.

Further this witness testified not.

* * * *

THE COURT: Your next witness, please.

MR. WILLIAMS: Mrs. Thomas Martin.

MRS. THOMAS MARTIN, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q This is Mrs. Thomas Martin?

A (hesitates)

Q Ma'am?
A Yes, sir.
Q Do you reside at 2402 Hammonds Drive?
A That's right.
Q You are an adult citizen of Nashville, are you not, Mrs. Martin?
A Yeah.
Q How long have you lived here?
[fol. 270] A About 17 years.
Q Prior to that time, where did you live?
A Gallatin, Tennessee.
Q And were you born and reared at Gallatin?
A Yes, sir.
Q What is your occupation, please, ma'am?
A I am a housewife.
Q I'm not hearing you too well. Try to talk a little louder.
A I am a housewife.
Q What is your husband's occupation, Mrs. Martin?
A He is a truck driver for Clements Paper Company.
Q All right. Now, Mrs. Martin, do you know the Defendant, Archie Nathaniel Biggers?
A Yes, sir.
Q How long have you known him?
A About 5 years.
Q How did you happen to become acquainted with him?
A I met him through my son.
Q Who, ma'am?
A My son.
THE COURT: She met him through her son.
MR. WILLIAMS: You met him through your son in [fol. 271] what way? How were he and your son associated?
A Well, they went to school together.
Q Went to school together? Now, then, has he visited in your home?
A Yes, sir.
Q At different times?
A Yes, sir, he has.
Q And you got acquainted with his parents—his mother?

A Yes, sir.
Q Have you visited her home from time to time?
A Yes, sir, I have.
Q How frequently have you visited her home?
A Well, not too many times—several times.
Q All right. Have you been there this year?
A Yes, sir, I have.
Q Now, have you noted anything unusual about Archie Biggers' habits with regard to either staying at home, or running around?
A No, sir.
Q When you have visited his home, is he usually there or away from home?
A At home.
Q Have you seen him out in the streets a great deal —running up and down the streets?
[fol. 272] A No, sir.
Q Have you ever seen him in that manner?
A No, sir.
Q Is your son a good boy?
GEN. HOLLINS: Now,—
A Yes, sir.
GEN. HOLLINS: Your Honor—
THE COURT: It's a foregone conclusion her son is a good boy.
MR. WILLIAMS: Mrs.—Mrs. Martin, are you familiar with people there in the community in North Nashville where this boy lives?
A Sir?
Q Are you familiar with people in North Nashville there around Scoville Street?
A Yes, sir.
Q Where Archie Nathaniel Biggers lives?
A Yes, sir.
Q Do you know many people in that community, do you?
A Yes, sir.
Q Have you heard those people discuss the Defendant and do you know his reputation, on the basis of these discussions that you have heard about him by other people?
A (hesitates)

[fol. 273] Q I'm asking—do you know what reputation is?

A Yes, I do.

Q You understand what reputation is? Reputation is not what you say yourself, it is what you hear other people say about an individual.

A Yes, sir.

Q Now, having that in mind as a definition, do you know the reputation of Archie Nathaniel Biggers, in that community where he lives, out there around North Nashville, for truth and veracity?

A Yes, sir.

Q Is that reputation good or bad?

A Good.

Q Do you know his reputation in that community for obedience and good character?

A Yes, sir.

Q Is it good or bad?

A Good.

Q Based on that reputation and on your own knowledge of him, is he, in your opinion, entitled to full faith and credit to be given to his testimony in a court of law? Now, do you understand that queston?

And your answer is Yes? Is that correct? Don't shake your head. Answer Yes, or No.

[fol. 274] A Yes.

Q All right. Have you ever known or heard of him being involved in any trouble or misconduct at any time? Prior to these charges being made?

A No, sir, not ever.

Q Have you ever heard of similar charges being made against him or being involved in any misconduct, other than what these people have alleged?

A No, sir, not ever.

Q Thank you, Mrs. Martin.

GEN. HOLLINS: Just one or two questions, Mrs. Martin.

MR. WILLIAMS: Wait just one minute! Has this young man ever stayed in your home?

A Yes, sir, he has.

Q How many times?

A Oh, several times.

Q Has he stayed in your home at times when your husband wasn't there, Mrs. Martin?

A No, sir, he haven't.

Q But you have kept him in your home, and he stayed there with your son?

A Yes, sir.

Q And you had a chance to observe his conduct at close range?

GEN. HOLLINS: That's a leading question.

[fol. 275] THE COURT: Yes. Members of the Jury, disregard that last question.

MR. WILLIAMS: That's all.

CROSS EXAMINATION

BY GEN. HOLLINS:

Q Mrs. Martin, has he visited in your home frequently?

A Uh—no, sir, he hasn't.

Q On how many occasions?

A Oh, he stayed, I would say, about four or five times.

Q Four or five times?

A Different times, yes.

Q And when he was staying over there, did his mother call him every fifteen or twenty minutes? While he was staying at your house, on the phone, did she call him every fifteen or twenty minutes?

A No, not every fifteen or twenty minutes, but she called to see about him.

Q Well, would she call just once while he was staying there, or more than that?

A Well, several times.

Q You mean every time he would stay there, she would call many times?

[fol. 276] A Yes, she would.

Q And would he call her many times? too?

A Well, he have called her.

Q Well, I say on each of these occasions, Mrs.—now, when he was staying at your house?

A Yes.

Q He'd call her a whole lot, and she'd call him a whole lot?

A Well, they would call each other.

Q Well, what was the reason for all that?

A Well, to let her know where he was.

Q Well—

A I think.

Q —would it be necessary for her to call him more than once to do that?

A Well, I don't know about that.

Q And Mr. Williams asked you about his reputation, now, and you said it was good?

Would your feeling be the same if you knew a woman has testified, under oath, here in court that he raped her at night? Would you still have that feeling that his reputation was good?

A Yes, sir, cause I have never known him to—

Q That's all.

REDIRECT EXAMINATION

[fol. 277] BY MR. WILLIAMS:

Q Well, since he asked that, would you believe that he raped a woman?

A No, sir.

GEN. HOLLINS: All right, now.

MR. WILLIAMS: Well, he asked her, if your Honor please—

THE COURT: No, never mind.

GEN. HOLLINS: I want some instructions to the Jury, on that statement.

THE COURT: Disregard the last question of Mr. Williams. I sustain the State's objection, and note an exception to the Court's ruling.

Any further questions, Gentlemen?

A No, sir.

THE COURT: You may step down and have a seat in the courtroom.

Further this witness testified not.

* * * *

THE COURT: Your next witness, please.

MR. WILLIAMS: Mrs. Gladys Leftwich.

GEN. HOLLINS: I am sorry, your Honor, I didn't get that.

MR. WILLIAMS: Mrs. Gladys Leftwich.

THE COURT: Have a seat, please.

MRS. GLADYS LEFTWICH, called as a witness [fol. 278] on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q This is Mrs. Gladys Leftwich?

A Yes, I am.

Q Mrs. Leftwich, I believe you are an adult citizen of Nashville and Davidson County, Tennessee, are you not?

A Yes.

Q And you live at 1901 Scoville Street?

A That's right.

Q Is that close to the home of Archie Nathaniel Biggers, the Defendant in this case?

A Yes.

Q Do you know him?

A Yes, I know him.

Q How long have you known him?

A About 6 years.

Q All right. And what is ır—are you a married woman, Mrs. Leftwich?

A Yes, I am.

Q We call you Mrs.—of course you are.

A Daniel.

Q What is your occupation, Mrs. Leftwich.

[fol. 279] A I am a saleslady for the North Carolina Mutual Life Insurance Company.

Q What does your occupation require as regards your daily activity?

A Going in and out of homes.

Q Have you visited the home of the Defendant, Archie Biggers?

A Yes, I have.

Q Visited it seldom, or frequently?

A Frequently.

Q Are they one of your policy holders?

A Yes, they are.

Q Are you also personally acquainted with Mrs. Biggers, his mother?

A I know her through my work.

Q But do you know her as a friend of yours especially?

A Well, I—just as—knowing them as going in and out of the home.

Q You know her? Is that right?

A Yes.

Q Are you related to them through the Biggers by blood or marriage?

A No, not at all.

Q Do you have any feel of partiality or anything [fol. 280] of that nature for the Biggers, any more than anyone else?

A No.

Q All right. Now, then, have you noticed anything in particular about the conduct of Archie Nathaniel Biggers in regard to him staying at home, or loafing in town, or running around?

A Well, the only thing that I can say is that when I go into the home, usually he would meet me at the door, or his mother would tell him to come to the door, and he always met me and spoke, and sometimes, after he would speak he would go to the back, and I would say, Nathaniel, what's happening? I'd say, What's happening why you are leaving the door, he said, Mrs. Daniel,—that's my career name is Daniel—he says that I'm so big, I'm ashamed of myself, and I said, But you're handsome. You're tall and handsome. A lot of men would desire to be the height and the size of you, that you are. And so, from then on, he always would talk to me.

Q Has he always been a courteous and mannerly boy? to you?

A Very nice, to me. I wouldn't want to meet a nicer boy.

Q All right. Now, let me ask you this, Have you been to the home at times when his mother wasn't there?

A Yes.

Q And no one was there but him?

[fol. 281] A That's right.

Q And you were inside the house?

A Yes, he'd let me in.

Q Has he ever made any overture toward you? or advance toward you, that was out of place or out of order at all?

A None whatsoever.

Q And you have been going there for 6 years?

A Yes.

Q For the record, do you feel like you are about as good looking as this prosecutrix?

GEN. HOLLINS: Now, that's not proper—

A Well, the looks doesn't have anything—

THE COURT: Just a minute. That's not proper, Mr. Williams.

MR. WILLIAMS: All right, sir.

THE COURT: Stay within the bounds of good character, if that's what this woman is going to do, and about his traits and habits. That's not a proper question. I sustain the State's objection.

MR. WILLIAMS: Now, Mrs. Leftwich, you—I think that you are very familiar with that community? you live in it yourself?

A Yes, I am.

Q And you understand what reputation is? Reputation is what other people say about you. And what other [fol. 282] people say about this Defendant. Now, having in mind that definition, do you know this young man's reputation in that community in which he lives for truth and veracity? for telling the truth?

A Well, I have—

Q What I am asking you is whether you know his reputation? Have you heard other people talk?

A I haven't heard anyone say anything about him—

THE COURT: No, no.

MR. WILLIAMS: You don't know—

THE COURT: Just answer his question.

MR. WILLIAMS: You don't know his reputation?

A No, I don't know.

Q You don't? All right. You are just testifying here to what you know personally? Is that correct?

A That's right.

Q Do you know or have you ever heard of this young man being in any trouble at all, prior to these charges being placed against him?

A No.

Q Never heard anything? Do you know anything else at all about this Defendant?

A Not a thing.

Q All right. Thank you.

CROSS EXAMINATION

[fol. 283] BY GEN. HOLLINS:

Q Just one or two questions: I understood you to say you didn't know anything about this Defendant's reputation for truth and veracity. Do you know anything about this woman's reputation here to tell the truth?

A Well, I know nothing about her but just the lady, cause I—I am a friend of hers and I've collected insurance in and out of her home.

Q How long have you known her?

A Well, I met her twelve years ago when I first started insurance.

Q Has she always been truthful with you?

A Very truthful.

Q Have you—

MR. WILLIAMS: Well, I object to that, if your Honor please.

THE COURT: That's all right. He can ask her, I think. Overrule your objection, and note an exception, to the Court's ruling.

GEN. HOLLINS: Do you think she is entitled to be believed in a court of law? in testifying?

A I have always had confidence in what—

THE COURT: No. The question is, please,—

A —what she tells me, yes.

THE COURT: Do you think she is?

A Yes.

THE COURT: All right.

[fol. 284] GEN. HOLLINS: When was the last time that you saw this—

MR. WILLIAMS: If the Court please, I object to that. He hasn't laid any proper foundation for a question as to whether the prosecutrix is entitled to belief in a court of law.

THE COURT: I think it's a proper question, Mr. Williams.

MR. WILLIAMS: All right, sir.

THE COURT: That witness could answer that question through her association of whether she would believe her on oath, or not.

MR. WILLIAMS: I take it, then, your Honor, then on Redirect I will be permitted to ask her the same question.

THE COURT: You can ask her about it.

MR. WILLIAMS: I didn't ask her.

THE COURT: I know you didn't.

MR. WILLIAMS: I thought it was improper.

THE COURT: I think it would be proper for you to ask that part of the question. Go ahead.

GEN. HOLLINS: When was the last time that you saw him over there, Mrs. Martin?

A Saw who?

Q The Defendant.

A I saw him in June. I started my vacation the 20th of June. I saw him just before that.

Q Did you ever see him anywhere else? so far as you know?

[fol. 285] A No, other than walking on the street.

Q You have seen him walking along the street?

A Yeah.

Q Was that in the daytime? or night?

A I saw him late in the afternoon.

Q Have you seen him on more than one occasion out?

A I had to see him because he lived in my neighborhood. I mean that's been a long time ago.

Q All right.

A Not recently.

Q But you have seen him out in the neighborhood?

A (hesitates)

Q Just like anybody else—walking on the street and that sort of thing?

A That hasn't been no time recent—in recent months because I never saw him in probably—probably a year nearly. Or something like that. Just on the street.

Q I—I know. But you have seen him on the street?

A Yes, I have seen him on the street.

Q Mrs. Martin, has that been on many occasions?

A Not too many because my work carries me [fol. 286] away from home most of the time.

Q Do you know where this lady lives?

A Yes, I do.

Q About how far is it from where the Defendant lives—two blocks? from Scoville Street over there to Meharry Boulevard?

A Un—Jefferson—Meharry, and she lives kind back off of Meharry—a little distance off of the street.

Q Yes, ma'am? About how far is it?

A Oh, I'd say it's about a mile, I guess, if you'd go direct.

Q That's all.

THE COURT: Any further questions, Mr. Williams?

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q Now, Mrs. Leftwich, what has been the Defendant's conduct with you, in your experience, in regard to being truthful or not being truthful?

A Are you talking about Mrs. Beamer?

Q No. Oh, no. The Defendant, Archie Nathaniel Biggers—has he been truthful? with you?

A Very truthful.

Q All right. And based on your experience with him, in your opinion, is his testimony given here in a [fol. 287] court of law entitled to belief and full faith and credit by the Court?

A Yes, so far as I know.
Q All right.
THE COURT: All right; General, is that all? Step down and have a seat in the courtroom, please.
Further this witness testified not.

* * * *

THE COURT: Your next witness, Mr. Williams?
MR. WILLIAMS: Mrs. Lela Mae McCoin.

(Mr. King is excused)

MRS. LELA MAE McCOIN, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q This is Mrs. Lela Mae McCoin?
A Yes, sir.
Q You live at 2022 Jefferson Street?
A Yes.
Q Mrs. McCoin, how—are you an adult citizen of Davidson County, Tennessee?
[fol. 288] A Yes, sir.
Q Are you a widow, or is your husband living?
A I am married. My husband is living.
Q Your husband is still living? All right, now, Mrs. McCoin, do you know the Defendant, Archie Nathaniel Biggers?
A Yes, sir, I do.
Q How long have you known him?
A I have known Nathaniel about 2 years and 5 months to be exact.
Q I forgot to ask you what your occupation is.
A I am a housewife.
Q And your husband's occupation?
A My husband is sick, and has been sick 3 years.
Q All right. Now, then, how long have you become acquainted with and known Archie Biggers, the Defendant?

A Well, two years and five months ago, I moved to 2109 Scoville Street. And of course it was in April when we moved there, and so I had to clean the yard up and do things around out in the yard, and so I heerd this lady tell the child—every morning—

GEN. HOLLINS: I object. That would be hearsay evidence.

THE COURT: Yes, it would be .... You can't testify to what someone else told.

[fol. 289] MR. WILLIAMS: You came to know him by virtue of him being a neighbor?

A Yes. I know him by him being a neighbor.

Q Was your home there on Scoville?

A Right across the street from him.

Q Right across the street from him? And you were about to tell what some neighbor said to him—

A Well, I—

Q You can't tell that, but you can tell what you observed.

A —I said lady because I didn't know his mother at that time.

Q But it was his mother?

A It was Mrs. Biggers would tell this boy every morning when she would leave, to keep the doors locked.

THE COURT: Well, if she was present and—the boy's mother?

A Yes, sir. She would come out of the house—they keep the doors locked. She would tell this boy every morning when she would leave to keep the doors locked.

THE COURT: All right.

A Well, I hadn't seen this child right then, but a few days later I began to see Nathaniel Biggers, and of course by him staying in the house all day like he did, I wondered about him, and I began to watch to see if he'd stay in [fol. 290] when his mother would tell him to. Well, I never would see him come out doors for he looked at television all day long, and occasionally I would see him look out the window, all day. That went on for about a year, and we began to worry about him and wonder what was wrong with a boy that large staying in, because she left, she'd say, Keep the doors locked, but every time anybody

knocked on the door over there, naturally we'd see it, because we was right on the front, my husband's bedroom and mine, right on the front. And we'd look out to see what was happening. He wouldn't come to the door but shortly after the person would leave, he would come to the door and look out.

Q Yes, ma'am?

A And for two years and a half I watched Nathaniel. I've seen him at the grocery store on several occasions, and he'd get his little cookies and trot right back home. And, as far as I know, I watched the boy for two years and five months, and—

Q Have you watched him closely?

A I watched him very closely.

Q Every day?

A Very closely because I am a missionary worker in my neighborhood, and so I watched the boy, and I never seen him leave home and stay over ten minutes, while I lived there.

Q All right. Now, then. Mrs. McCoin, have you—do you feel you also know his reputation there in that com- [fol. 291] munity where he lived, for truth and veracity?

A Yes, sir, I do.

Q Is it good, or bad?

A He's a perfect little gentleman.

Q Is his reputation good or bad?

A Good.

Q All right.

A I would say good.

Q You also know his reputation for good character and being obedient?

A That's right.

Q Is it good or bad?

A Good.

Q All right.

A Very good.

Q Based on your personal contacts with him, and based on your knowing his reputation, in your opinion, is his testimony given from that stand to this Court and to this Jury, entitled to full faith and credit, in your opinion?

A Yes, sir. Yes, sir.

Q You would believe him, under oath, in a Court of Law?

A I would.

Q Under any circumstances?

A I would.

[fol. 292] Q You state that you are a missionary, Mrs. McCoin?

A Yes, sir, I am.

Q Would you just try to elaborate on that and tell us what—

A Well, I—

Q —what institution you work with?

A I am working with the Mt. Zion Baptist Church, as a missionary worker. I go through the neighborhood and find the sick, the children that need help, the children who don't obey, and try to get corrections done, and I take these children. I take children in my home—

Q All right?

A And I watch these children, and I see that they are telling the truth, and if they are not, I see that they are being punished for it by their parents. That is one of my jobs.

Q Mrs. McCoin, do you believe that you would know if there is any thing—any misconduct that this young man was guilty of?

A Yes, sir. I would.

GEN. HOLLINS: I object to that, if your Honor please.

THE COURT: Yes, just a minute. You'll have to rephrase your question, Mr. Williams.

MR. WILLIAMS: Uh—

[fol. 293] THE COURT: You might ask her if she knows—not—

MR. WILLIAMS: Do you know of his ever having been involved in any misconduct whatever, by way of even so much as just telling a falsehood?

A No, sir.

Q Does he go to Sunday School ever Sunday, and conduct himself as a proper boy should?

A He's as good a boy as is in the whole neighborhood. I'll say that.

Q Well, there are some good ones in the neighborhood, aren't they?

A Yes, sir. We have some, but not like him.

Q But not like him?

A Not like him. And I work with them.

Q Thank you, ma'am.

THE COURT: Cross examine.

CROSS EXAMINATION

BY GEN. HOLLINS:

Q Is that Mrs. McCoin? or—

A McCoin.

Q McCoin? You say you have been watching this gentleman for two and a half years?

A Yes, sir.

Q Every day?

[fol. 294] A Every day.

Q Every night?

A Every night until bedtime.

Q What time do you generally go to bed?

A Maybe 1:00 or 1:30. Sometimes 2:00 o'clock in the morning when I go to bed.

Q What do you do? Just sit there in the living room and look out the windows at night?

A No, sir, I don't. Every time I hear a sound I go out on the porch.

Q No matter whether it's cold or hot?

A It don't make any difference. If I hear any sounds out there, I go out there.

Q And could you watch this house two and a half years without interferring with your housework?

A No, sir.

Q It hasn't interferred with all the other work you were doing there—like community work and checking on children and seeing if they are behaving?

A No, sir.

Q In the whole block?

A That's right.

Q I take it if you heard a noise you would run out on the porch, no matter whose house you were in?

A Well—

[fol. 295] Q And look up there?

A —I wouldn't see a whole block, but I could see right around me.

Q And you watched at night, too?

A Yes, sir, I've been watching at night.

Q You didn't have any trouble seeing in the dark, did you?

A No, sir, not a bit, cause I've got a porch light, and I can turn that on, and I could see all around without a street light in front of my house.

Q Is that—can you see in his yard and your yard?

A That's right.

Q Well, when he come out at night and would leave, would you follow him?

A No, sir, I didn't follow him, cause he wouldn't be gone long enough.

Q Well, did you always time him?

A Yes, sir.

Q What time did he go out on the night of January the 22nd?

A Well, I wouldn't be able to tell you that, cause I didn't even see him go out that night. I didn't—

Q What day of the week was that, Mrs. McCoin?

A What did you say?

[fol. 296] What day of the week was that? on January the 22nd?

A I couldn't tell you to save my life what day of the week it was.

Q Well, you were watching him that night, weren't you?

A I watches every night.

Q What kind of weather was it that night?

A It was kinda cold. I know that.

Q Well, was it raining? Snowing? or what?

A No, it wasn't snowing. I don't know whether it was raining, or not. But I know it was kinda cold, because I was sick, and I wasn't in bed.

Q Well, that night did you go out on the porch to check on him?

A I probably went out and looked at his house, but I didn't see Nathaniel come out that night.

Q What time did you go to bed?

A Uh—it probably was around 12:00 or 1:00 o'clock.

Q How is it you are able to tell us what time you went to bed, when you can't tell what day of the week it was?

A Well, because I watches television every night.

[fol. 297] Q What was on that night?

A I just don't remember.

Q Well, how can you tell us what time you went to bed?

A Well, I know what time I go to bed, cause I look at the clock every night before I go to bed.

Q You go to bed the same time every night?

A No, I don't go to bed the same time every night. Some nights I stay up till 2:00 or 2:30.

Q Well, did you see anybody come in or go out of that house all day?

A I didn't see anybody come out or go in.

Q Well, did they have their lights on over there?

A Yes, the lights were on early in the night.

Q Well, now, you must have seen his father come home from work?

A I seen his father and mother when they came home from work.

Q What time did they come home?

A Well, they usually get home around—right after

Q I don't mean usually—what time did they get home that night?

A Well, I don't know the exact time, cause I didn't look at the clock, to see what time they come. They come about the same time every night. And I don't always see them.

[fol. 298] Q Well, you saw them that night, didn't you?

A Yes, sir, I seen them come home.

Q How were they dressed?

A I just couldn't tell you that. I know her husband wears a blue uniform at all times, when he's working.

Q How do you remember all these things? Have you got you a notebook, or something, that you write down—

A I just remember these things.

Q I take it that night you didn't have to check on any of the other people in the course of your missionary work?

A Well, I have a little boy right next door that I kept every night last year, until his father or mother would come home. His mother works at night. Sometimes she picks him up at 10:00 o'clock. Sometimes it would be 11:00. Sometimes after 11:00. And I am always at my door around that time of night. I kept him all last year.

Q Did you have to go out and do any more missionary work that day or that night?

A No, I might have been out that day, but not that night, because my daughter lived right directly across the street from Mr. Biggers, and I were there all times of the day, and a lot of times until 11;30 at night.

Q Oh? How did you work it when you cooked supper that night?

[fol. 299] A I cook my supper any time I want, cause nobody at my house works. Everybody is sick.

Q Well, I mean how do you keep your eyes on that door while you were cooking your supper?

A Well, there's three ladies at my house. And I didn't have to just stay in there with it. When I put my supper on, I could go where I wanted to.

Q Well, did you tell one of the other ladies to look at the door while you were cooking supper?

A No, I didn't.

Q You didn't cook the supper?

A I don't know whether I cooked it that night, or not.

Q Well, don't you get tired just sitting there for two and a half years watching that house?

A No, sir, I did not, because that's part of my job.

Q Yes, um, you've got a lot of stamina just to watch it. That's all.

THE COURT: Further questions, Gentlemen?

You may step down and have a seat in the courtroom.

Further this witness testified not.

* * * *

[fol. 300] THE COURT: Next witness, please.

MR. WILLIAMS: Mrs. Roberta Alsup.

THE COURT: Mrs. Alsup.

GEN. HOLLINS: May the Court please, may we take about a five-minute recess?

THE COURT: No, General. We'll take one shortly. We've got to move along.

MRS. ROBERTA ALSUP, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q This is Mrs. Roberta Alsup, I believe?

A That's right.

Q Mrs. Alsup, you are an adult citizen of Davidson County, Tennessee, are you not?

A That's right.

Q And do you reside at 2022 Jefferson Street?

A That's right.

Q And that's in the same home where Mrs. McCoin resides, isn't it?

A That's right.

Q Mrs. Alsup, are you a widow? or are you—

[fol. 301] A I am Miss Alsup. I haven't got a husband.

Q Oh, you are Miss Alsup? I'm sorry.

Now, then, are you acquainted with the Defendant, Archie Nathaniel Biggers, Miss Alsup?

A Yes, sir.

Q How long have you known him?

A Since '63. We moved across the street from them. In '63, in April.

Q All right. Now, have you since that time, and right up to the time that he was arrested, had an opportunity to observe his conduct there with regard to the frequency with which he would leave his home?

A Yes, sir. During the time we moved there I was a heart patient, and I was in bed, from '63 up until just before '65. And I was required to stay in bed, and my

bed was right at the window. And I lived in the front room.

Q I can hear you fairly well, Miss Alsup, but there might be somebody that can't hear you. Will you talk just a little louder, so that they can hear you, please, ma'am?

A I—When we moved there in '63, I was a heart patient. I was sick then. And I was required to stay in bed, to rest.

Q Well, now, that was before his arrest, wasn't it?

A Yes, sir. That was on Scoville Street. We—

[fol. 302] Q What was that number of Scoville Street?

A 2109.

Q All right.

A And—and in the meantime, we didn't have nothing to look at but across the street at the houses, and we's at the dead end of the street. And I said, Oh, Lord, this is a dreary place. And then I began to watch the children—over at different one's houses across the street. This particular time—some one come down, and I see them meddling over there, and I said, What are you all meddlin' over there? And they told me about this boy. Well, I got concerned about him, and he worried me cause all he would do was stay at home, and come to the door and look out. If anyone come up, he wouldn't answer the door, then he'd wait till they would leave, and then he would come to the door. And answer the door. And I said, Well, why couldn't he come then? And it worried me—but he was always at home, and it worried me why did he stay at home so much, and not get out and carouse up and down the street like the rest of the boys. And I would lay there and fuss, and I worried and I worried and I worried about him, till it just made me sick, and the Doctor said, Well, you're just going to have to quit worrying about that boy. I said, How can I? I said, He's a boy, and it worries me. Because—

Q Was he—

A He didn't go anywhere night or day.

[fol. 303] Q Uh-huh? Uh-huh?

A And it was enough to make you concerned about him.

Q Did you discuss it with his mother?
A No. I—I—I wasn't able to get out.
Q Uh-huh?
A But I said when I did get out, I said, I am sure going out somewhere. And why does she keep him housed up like that? all the time?
Q All right. Now, he just stayed in that house night and day, didn't he?
A That's right. I know that definitely to be facts.
Q Now, then, after having lived in that community—do you know his reputation in that community for truth and veracity?
A The neighbors—every one that would come in to see me, I said, I would ask them about him.
THE COURT: Just answer his question.
MR. WILLIAMS: Do you know his reputation—don't tell exactly what they said, to you, but do you know his reputation?
A I—I certainly do. I know—
Q Is it good, or bad?
A It is good. He was a good boy.
Q Do you know what his reputation is in that com-
[fol. 304] munity for good character—
A Yes, sir.
Q —and obedience?
A Yes, sir. I certainly do.
Q Is it good, or bad?
A It's really good. No kiddin'—it's really good.
Q Based on that reputation, is this Defendant, in your opinion, entitled to full faith and credit to be given to his testimony in a Court of Law?
A That's right.
Q Ma'am?
A That's right.
Q Your answer to that would be Yes, or No?
A Yes. He's a good boy.
Q Do you know, or have you ever heard of him being involved in any trouble or misconduct at all?
A No, I haven't. I haven't heard of anything wrong, seriously.

Q Haven't heard a thing bad about that boy?
A That's really facts.
Q What was your occupation before you fell ill, Miss Alsup?
A Well, I've got a family that I've been working for about thirty or forty years. See, I'm an old lady. And [fol. 305] I nursed the mother and father till they died. And then I stayed in the family and take care of the sons and daughters. I'm still with 'em.
Q How long have you lived here in Davidson County?
A All my life.
Q And you say, I know it's kind of improper to ask a lady her age. But just from the standpoint of this record, and that it may show that this Jury may fully realize the value of your testimony, how old are you, Miss Alsup?
A I'm 67.
Q And may I ask,—I'm sure she wouldn't mind—asking the age of Mrs. McCoin, if you know?
A (not understandable)
Q All right.
THE COURT: Is that all?
MR. WILLIAMS: Yes, sir. That's all, your Honor.
GEN. HOLLINS: Just one or two questions.

CROSS EXAMINATION

BY GEN. HOLLINS:

Q I believe you said that you were in bed there in 1963? Is that right?
A Yes.
Q And you watched the house then?
[fol. 306] A That's all I had to do.
Q How long were you in bed?
A Uh—
Q When did you get out of bed?
A Just in '65.
Q Well, when in '65?
A In January.
Q When in January? Do you know what date in January you got out of bed?

A No, I don't, because—

Q But every day you watched the house?

A There wasn't but two houses on that side, that you could watch. I watched that un in particular because I always wanted to see the reaction of him if he come outdoors. I wanted to see how he'd act. Uh—I was—

Q Did you watch that just night and day?

A Yeah, because I couldn't sleep at night. See, I have heart trouble, and I still don't do too much sleeping at night, but I am in a better condition than I was then.

Q About how many years did you watch that door and house?

A Well, we moved there in '63 in April. And after we was there a month or so, I guess, I started to being concerned about him.

Q But did you watch it? still watch it?

[fol. 307] A Yeah. I watched it.

Q I take it that Mr. Biggers came out some times, didn't he?

A He came to the door, and then, if—just like a collector come to the door, and knock, well, he wouldn't answer the door right then. When the collector would leave the door, then he would come and look out, and go back in and shut the door. And I'd laugh—I'd laugh (laughs) I said, Well, why didn't he answer the door then? you know, while he was knocking.

Q Well, did you watch it—were you watching it in June of this year? watching the house then?

A No, I wasn't watching it in June.

Q When did you quit watching it?

A Well, I—quit watching it when I got able so I could go back to work.

Q When was that?

A That was in the middle of January.

Q In the middle—you say about the 15th?

A I don't know the exact date of that.

Q Were you watching it on January the 22nd? or had you already gone back to work then?

A I was at work.

Q January the 22nd? And you didn't watch it any more after you went to work?

A I didn't watch it any more after he got in this [fol. 308] trouble. I didn't watch it, any more. I just commenced worrying about him, then.

Q How come you to stop watching then?

A Well, he wasn't there for me to watch it.

Q And you are telling this Jury that in all of two years that you watched it—or whatever time it was—you never saw him come out?

A Not farther than the door and the porch.

Q Never did—

A He would pick up the paper and—in the morning, he would pick up the paper, and he'd go back in, and when his mother would come in the car with groceries, he would go out to the car and get the groceries, and go back in.

Q And you watched it from the time you woke up in the morning? What time did you wake up?

A Sometimes I hadn't been to sleep all night. I wouldn't have to wake up an hour. I was just wakeful all night, and all day.

Q Well, you were actually watching about 24 hours a day?

A Well, now, that's just about right. (laughter)

Q All those years? How about it?

A Well, now, that's true.

THE COURT: Let's have order in the courtroom, please.

GEN. HOLLINS: And he never came out of the house?

[fol. 309] (# 26L WAS OMITTED)

A No, sir. I—I—

THE COURT: She has testified that she never did see him come out.

A I'm telling the truth about it.

GEN. HOLLINS: Yes, ma'am? That's all.

THE COURT: Anything further, Gentlemen?

If not, you may step down and have a seat in the courtroom.

Further this witness testified not.

* * * *

to make that community a fit place to live in, where good women like Mrs. Beamer are not subjected to the sort of things you have been hearing testimony about in this case.

Certainly, Gentlemen of the Jury, what you may have heard from Counsel is not proof, it shouldn't be considered by you as proof, and the only thing that you can hear and decide this case on is, as is the situation in every case, from what comes from the witness stand—what you hear from the witness stand, the law given to you by the Court.

Certainly all testimony in this case can't possibly be reconciled, and I am not going to attempt to discuss the said statements of each and every witness. When the testimony in any case can not be reconciled, it is up to you, the Jury, to hear the witnesses, weigh and consider the testimony,, and to determine if they are speaking the truth, or swearing a falsehood, and then decide what really happened on January 22, of this year.

I believe the Court will charge you that the law presumes every witness has sworn to tell the truth, and you [fol. 313] are not justified in disregarding the testimony of any witness unless you find that conflicts in the testimony of that witness for some reason or more than one reason are such that you elect not to accept.

The first witness that testified for the State was, of course, the Prosecutrix, Mrs. Margaret Beamer. The first thing she said was to draw this diagram. Now, Gentlemen of the Jury, I don't know how this good woman impressed you, but she impressed me as a person of good character who had come into this courtroom to tell the truth. What possible motive, Ladies—uh Gentlemen of the Jury, does this woman have to misrepresent anything. What do you have in these rape cases? The Prosecuting witness. Ordinarily when a Defendant is going to make a rape, he doesn't take a witness with him. Now, what does she say?

She's home here in her house, with her daughter and her young son. She comes out into the hall, from the living room, light on in the bedroom, light on in the adjoining bedroom, and this fellow grabs her and has a long butcher knife and he throws her down on the floor and she starts screaming. Now, her daughter comes in, and this Defend-

ant tells the mother, I'm going to kill both of you, if you don't get that little girl out of this room. So the mother says, Francesca—go into the room and shut the door. Then he takes her—by the way, Gentlemen of the Jury, no one [fol. 314] outside of this area could have taken her through these areas, where people were not likely to have been seen, without having some experience with it.

Take her through the back door, through the alley, and on top of the railroad, there on the railroad tracks where the criminal assault occurred. For instance, penetration is what's required for rape, and has to be against the will of the person on whom the rape has been committed. Now, Mrs. Beamer, what is it about this Defendant, if anything, that caused you to remember him? No. 1. And Gentlemen of the Jury, as I have been seated at the Counsel table at this trial, I have observed the Defendant, as I am sure most of you have. No. 1, his size, his type, the size of his head, his stomach, and his chest. I don't know about you, Gentlemen of the Jury, I have observed the Defendant. He is unusually large for a person his age.

What else, Mrs. Beamer? The sound of his voice, he has a low voice, like that of a young man.

What else, Mrs. Beamer? Stomach. Obese.

What else? Chest, obese.

What else? Hair.

What else? Lack of beard.

Gentlemen, several years ago, when I first started practicing, on a number of cases oh about two years ago, I tried a case of armed robbery, and in all these cases, you [fol. 315] have the question of identification. After this case was concluded, one of the Jurors came to me, he said, You know, Mr. Hollins, when I was in the Army, World War I—World War II, I was in the trenches, and I looked up and I saw a big German soldier, with a bayonet, standing over me. Somebody shot him and I was saved. But he says, You know, if I saw that soldier walking down the street today right here in the street, I would recognize him. And there'e something, Gentlemen of the Jury, about the violence and terror of a situation that fixes these matters indelibly in a person's mind. And if you don't think that this is true, then you acquit this Defendant.

The police officer's testimony was essentially the same. Some officer made the initial call, took her to Hubbard Hospital where she was examined by Dr. Core. Went by to see her house, took pictures, had a lead on suspects, and on August 17th, took her down to the police station where she viewed and identified the Defendant Biggers.

What did her little daughter say—Francesca? If these people, Gentlemen of the Jury, had been trying to mislead this Jury, and had some axe to grind, and this little girl had been brainwashed by her mother, as you would be led to believe, do you think for a moment that she wouldn't have stood up on that witness stand and testified before the Jury—if these people weren't testifying the truth and all the truth and the complete truth? And what did that [fol. 316] little girl say? And I think she made a fine witness. In the bedroom playing some sort of record. Some of you gentlemen may have teen agers—if you have, I am not familiar with these artists that she was listening to—she heard her mother scream, her mother came into the—uh, she came to the bedroom door in the hall, there she saw her mother on the floor, there she saw a man, beside being big he was tall, he was dark, had on a sport shirt, short sleeved, and had a young voice. And her mother told her at the Defendant's request, to go back to her bedroom, and she went there. And she got in bed with her brother. She was terribly frightened. And she stated it was some 15 to 20 minutes until her mother came back down the railroad tracks, and called the police.

Now, what would you have done if you had been that child?

What would you think if you knew that a man was in the other room there, when you went in the bedroom, with a knife, and had threatened your mother?

What effect, Gentlemen of the Jury, what possible effect do you think that such an experience would have on this child? in the later years of life?

Dr. Core, called as a formal witness, found moving sperm. Dr. Core, what does that mean? It means a lot of sperm, fresh. Your medical opinion, Dr. Core? How long had it been there? About three hours. What else [fol. 317] did you see, Dr. Core? Dirt and grass stains on her back.

And then the State closed its proof, Gentlemen of the Jury, and the Defendant started putting on its proof.

Where were you on January the 22nd? Don't know. What day of the week was it? Don't know that. How were you dressed? Don't know that. What were the weather conditions? Don't know that. Does he really deny anything? Gentlemen of the Jury? He said he always stayed home. But the real thing, Gentlemen of the Jury, about his testimony that troubled me the most was this testimony about this railroad track and this street two blocks from his home.

He didn't even know it was there. He didn't even know Meharry Boulevard was there, and they put his stepfather on the stand, and he said they drove down Meharry Boulevard when they went to work every day.

I don't know what you did when you were young, Gentlemen of the Jury, but if there was anything that I got a kick out of when I was a kid, it was walking down the railroad tracks. Isn't that true of most kids? And can you really believe that that boy being raised in that neighborhood and having this railroad track run down from Meharry through Jefferson to Scoville wouldn't really know? or do you believe, Gentlemen of the Jury, that this Defendant, knowing this neighborhood, got on the [fol. 318] railroad track at his own residence two blocks away, walked up the railroad track till he got behind this woman's house, walked in the back door, and carried her out?

Then his mother testified. She doesn't—she can't tell you where he was on January the 22nd. And what bothered me most about her testimony, Gentlemen, was all these telephone calls. I never heard so many telephone calls in my life. And maybe they made them back and forth, and maybe they didn't, but I submit to you, Gentlemen of the Jury, that if they did make those calls, and that if they did make them back and forth, it was so she could keep up with where he was, knowing what his potentialities were and his inclinations were, she wanted to know where he was.

And that stepfather—he was familiar with that general area, if the son was not.

Now, what about all these character witnesses and the witnesses regarding this Defendant and his family. Most of them said they'd see him out, contrary to what the last two said. One lady even testified that she knew him through her son, that he visited over at her house.

And, then, Gentlemen of the Jury, the Defendant put on Mrs. McCoin, and Mrs. Alsup. After putting on two witnesses who gave this boy a good character, said they had known him for years and years, they put on Mrs. McCoin and Miss Alsup. Now, they, Gentlemen of the [fol. 319] Jury,—does any man on this Jury actually believe that these two good women watched that Defendant's home for two and a half years? Miss Alsup stated that she watched it 24 hours a day, for two years. Can anybody in the wildest stretch of his imagination believe that they studied that house that way? Surveillance? If they can do that, Gentlemen of the Jury, I submit to you that they ought to be with the CIA.

Now, how can you square the testimony of Miss Alsup that she watched this house for two and a half years for 24 hours a day with the testimony of this other witness, I believe her name was Morgan, the lady who testified her son brought Mr. Biggers over to her house. That they would come there. Surely he had to go to school, if they were schoolmates. And surely he went to school in two and a half years.

All right. So much for the testimony, in this case, Gentlemen of the Jury,—if you will, for just a minute, now, put yourself in the position of this fine woman at home in that house at night, subjected to these acts, of terror and brutality.

Before I qualified this Jury, before I accepted this Jury, completely, I asked you two or three questions. The first question, Can you put aside any sympathy or prejudices that you may have, and render a fair and impartial verdict for the State and the Defendant? Second, If the State made out its case beyond a reasonable doubt, would you acquit this Defendant simply because he's 16 years [fol. 320] old? Now, this day and time when a person is under 18, and gets into any difficulties, it looks to me like, Gentlemen of the Jury, there is a popular tendency and

a popular conception to blame it on their parents, or blame it on society. But I submit to you, Gentlemen of the Jury, that there are many teen agers, young people, raised in poor economic circumstances, that go on to become useful citizens, in our society,—a lot of them do.

Mr. Looby and Mr. Williams will talk to you, and then I will talk to you again.

(Mr. Williams summed up to the Court and Jury on behalf of the Defendant, Archie Nathaniel Biggers.)

(Mr. Looby summed up to the Court and Jury on behalf of the Defendant.)

(Gen. Hollins gave the final summation for the State, as follows:)

BY GEN. HOLLINS:

Gentlemen of the Jury, it's been a long day and I know you're tired, and I am going to be as brief as I can. I think I should sort of defend myself after hearing Mr. Williams and Mr. Looby. I sort of forget how bad I am until I try these cases and I hear these lawyers talk about me—and the District Attorney's office, how we don't have any regard for human rights. Mr. Williams said that he didn't want you to decide this case on emotion, but I haven't heard Mr. Williams and Mr. Looby talk about anything else but emotion. They each talked about these various marks of identification, and went over them one at a [fol. 321] time that Mrs. Beamer told you about, and said that there's someone around that has each of these. So much for the sticks, and the man that could break them one at a time, but when you tie them all together, then you can't break them up.

And then you, Gentlemen of the Jury, will remember, No. 1, in order to do this you have got to have another person, and this Defendant's size, there he is sixteen, with a boy's face, with a smooth face, with a large head, and talked—you remember? is that right or is it not?

Does any member of this Jury here think he would have any trouble identifying this boy? for something? Mr. Williams asked why would this Defendant—why

would he pick that spot? why did he take the railroad tracks? why didn't she scream for help? Gentlemen of the Jury, had she done that, we would be trying a murder case here today. Now, the defense, and Mr. Williams and Mr. Looby are very good lawyers, and they have defended their client very well in this cause. They have changed their tactics, though, from the start of this case, and for what, Gentlemen of the Jury, did they change? You recall Mr. Looby's statement to Officer Smith on the witness stand. And he put all his eggs in one basket, and he said this is our theory. Our theory is that the way Mrs. Beamer could identify the Defendant Biggers was because she had just seen his picture in a newspaper before she viewed him, and then, Gentlemen of the Jury, after the [fol. 322] testimony from Mr. Frank Ritter of the Nashville Tennessean that the picture didn't come out until August the 18th, Mr. Williams and Mr. Looby, in their defense of their client, tried to inject many immaterial matters, and tried to confuse this Jury as much as they could. How in the world can you explain, Ladies and Gentlemen,—uh—Gentlemen of the Jury, taking three days to pick a Jury, and qualify them on the Defendant not taking the stand, and then put him on? Was that an attempt to confuse the Jury? or if it was not an attempt to confuse the Jury, then what is it?

Mr. Williams has attacked the police department, the district attorney's office, but I tell you this, Gentlemen of the Jury, there's some pretty doggone good police work done in the apprehension of this Defendant. You recall when Officer McDaniel was on the witness stand, when he was on the witness stand, Mr. Williams asked for his notes that he had on this, and didn't ask a question on his notes? It's a fact, and they're good lawyers. And Mr. Looby and Mr. Williams both say that this—just because the Defendant can't remember where he was on this date —said he can't remember what he did last week; on the face of it, that sounds like a mighty easy matter, Gentlemen of the Jury, but you have to take into consideration, Number 1, you have got to remember because you are being charged with rape and Number 2, you've not only [fol. 323] got to remember, yourself, you've got to plan

and you've got to interview witnesses and check records, and establish those things, so when you apply a little logic and a little common sense, this wild reasoning, Gentlemen of the Jury, goes out of the window.

In many parts of our United States, Gentlemen of the Jury, a case of this nature would never go to trial, and I'm sorry to say, it's all south of the State of Tennessee, and that is because of this fine woman, Mrs. Beamer's environment, economic circumstances, and situation, she's not considered in those states to have any more rights than a dog and her reproductive organs—

MR. WILLIAMS: (interrupts) We object to this line of argument, your Honor.

THE COURT: Yes.

(the Edison Voicewriter is not clear at this point)

MR. WILLIAMS: We would like to move for a mistrial, your Honor, please.

THE COURT: The Court will overrule your motion for a mistrial, and note an exception to the Court's ruling.

GEN: HOLLINS: Here in Davidson County, Gentlemen of the Juty, we have a Jury that can put aside sympathy, prejudices, it may have to, and render an impartial verdict both to the State and to the Defendant. We have drives, all of us do, it's body chemistry. These drives and needs have to be satisfied. (not heard we) These are [fol. 324] basic needs, like we want to keep warm. Sex is another basic need.

These drives and these needs have to be kept under control, and when they are not kept under control, then terror and violence triumphs, like this one here.

Mr. Looby and Mr. Williams say we shouldn't convict this boy because he is 16, and send the defendant home. Well, Gentlemen of the Jury, this case is not the same as if we would try an adult. And I want you to pay particular attention to the Court's charge, if you convict this defendant, as to the punishment, cause it is not the same. I have asked you gentlemen—I want to say this—if a person can commit an offense of this nature in our community and go unpunished, then something is wrong with our system of justice.

THE COURT: Members of the Jury, we cannot conclude this case today. Your evening meal has been ordered for you at 6:00 o'clock. The Court will instruct you explicitly, do not discuss this case among yourselves under any circumstance, or permit any other member of the Jury to talk to you about it. Wait until the charge of the Court, and then you enter upon your deliberation. I reiterate again, Gentlemen, do not discuss this matter under any circumstance.

Your evening meal has been ordered for you, and we will adjourn Court until in the morning, at 9:00 o'clock, at which time the Court will give you the charge. You may step out with Mr. Griggs and Mr. Lawrence to the Assembly Room upstairs.

(Court is adjourned for the day.)

[fol. 325] FIFTH DAY (December 3, 1965)

* * * *

CHARGE OF THE COURT:

BY THE COURT:

Members of the Jury:

The indictment in this case charges the Defendant with the offense of rape, and is in words and figures as follows:

"STATE OF TENNESSEE, DAVIDSON COUNTY

SEPTEMBER TERM OF THE CRIMINAL COURT, 1965.

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn, and charged to inquire for the body of the County of Davidson and State aforesaid, upon their oath aforesaid, present: That Archie Nathaniel Biggers (c) heretofore, to-wit, on the ..... day of January, 1965, and prior to the return of this indictment, with force and arms, in the County aforesaid, unlawfully, feloniously, and violently, did make an assault upon the body of one Margaret F. Beamer (c) a female, and her the said Margaret F. Beamer then and there unlawfully,

feloniously, violently, and against her will, did ravish, and carnally know, against the peace and dignity of the State of Tennessee.

HARRY G. NICHOL
Attorney General."

While this indictment contains but one charge upon its face, in contemplation of law it embraces the offense of attempt to commit the felony of rape and the misdemeanor count of assault and battery.

To this indictment and each count thereof, the Defendant has entered a plea of not guilty.

In the trial of all criminal cases the law distinctly defines the duties incumbent upon the Court and upon [fol. 326] the Jury. It is the duty of the Court to give in charge to the Jury, clearly and distinctly, the law applicable to the case on trial.

In criminal prosecutions you are the judges of the law and the facts, and it is your duty to take the law as it is laid down to you by the Court and apply the law and the facts to each other. You are the sole and exclusive judges of the facts, of the credibility of witnesses and the weight to be given their testimony.

It is the duty of the Jury to carefully consider all the facts and circumstances related to you by the proof with an eye single to truth and justice, and make and report to the Court such verdict as you think truth and justice dictate. In the discharge of your duty, you should never have any sympathy or prejudice, but should always act with absolute impartiality and, under the law as given to you by the Court, render your verdict.

I shall now proceed to explain to you what in law it takes to constitute the offense charged in the indictment.

By § 39-3701 of the Code of Tennessee, the offense of rape is defined as follows:

> "Rape is the unlawful carnal knowledge of a woman, forcibly and against her will. Carnal knowledge is accomplished by the commencement of a sexual connection, and proof of emission is not required."

warden of the penitentiary the original commitment papers in this case . . ."

Therefore, I charge you that if you find the Defendant guilty of rape beyond a reasonable doubt and commute his punishment from death by electrocution to imprisonment, then the form of your verdict would be, "We, the Jury, find the Defendant guilty of rape and fix his punishment at imprisonment in the State Vocational Training School for Boys for life or a period of not less than ten (10) years.

[fol. 330] If after a consideration of all the facts in the case you have a reasonable doubt of the Defendant's guilt or innocence of the offense of rape, it would be your duty to give the Defendant the benefit of such doubt and your verdict would be simply, "not guilty".

Your next inquiry will be whether or not the Defendant is guilty of an attempt to commit the felony of rape.

§ 39-603 of the Code provides as follows:

"If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the Jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500.00)."

To constitute an attempt to commit a crime, an intent to commit it must exist simultaneously with some act done in furtherance of the intent and with a purpose of consummating the contemplated crime.

§ 37-625 of the Code provides that in a case of this character where the Defendant is charged with the crime of rape that should the Jury convict him of any lesser included offense, to-wit; an attempt to commit the crime of rape or assault and battery, he shall be remanded to Juvenile Court for disposition only, and it is only the duty of the Jury to determine the guilt or innocence and fix

[fol. 331] the punishment in accordance with the statutes heretofore quoted. The place of confinement shall be determined by the Juvenile Court Judge.

If you find the Defendant guilty of the offense of attempt to commit the felony of rape, you will only fix his punishment, and the form of your verdict will be, "We, the Jury, find the Defendant guilty of attempted rape and fix his punishment at not more than .... years, you, the Jury, filling in the blank space with the maximum number of years or period of time for which he shall be confined. In no instance can it be less than one year nor more than five years.

However, should you feel that one year is too severe a punishment for the Defendant, you may punish by way of confinement at any time less than a year and by fine not exceeding $500.00. In which event, the judgment will be remanded to the Juvenile Court for disposition, and the place of confinement shall be determined by the Juvenile Court Judge.

If you find the Defendant not guilty of an attempt to commit the felony of rape, or if you have a reasonable doubt as to his guilt or innocence of that offense, you should acquit him and "not guilty" should be your verdict.

Your next inquiry will be whether or not he is guilty of assault and battery which is a misdemeanor.

An assault has been defined as any attempt or offer, with force or violence, to do a corporal hurt to another, whether wantonly or with a malicious intention, with such [fol. 332] circumstances as denote an intention to do it at the time, coupled with the present ability to carry that intention into execution. The battery is merely the successful termination of the assault. The assault is the beginning of a crime, the motive of which is the infliction of some corporal hurt upon another without that person's consent. As soon as the person assaulted is touched, no matter how trifling the hurt or touch may be, the battery has been committed.

§ 39-105 of the Code provides:

> "Every person who is convicted of a misdemeanor, the punishment for which is not otherwise prescribed

by a statute of this state, shall be punished by imprisonment in the county jail or workhouse not more than one year, or by fine not exceeding one thousand dollars, or by both, in the discretion of the court."

§ 40-2525 of the Code provides:

"Where an indictable offense is punished by fine, or by fine and imprisonment, the jury shall assess the fine, if, in their opinion, the offense merits a fine over fifty dollars."

If you find the Defendant guilty of assault and battery, you fix his punishment by way of a fine which in no event can exceed $1,000.00, and you do not assess any term of imprisonment, this under the Code being left to the discretion of the Court trying the case. If you find the Defendant guilty of assault and battery, and if in your opinion the offense merits a fine of over $50.00, then you must fix such fine in your verdict, which in no event can [fol. 333] exceed $1,000.00, and the Court, in addition thereto, can assess imprisonment not exceeding one year. However, if you find the defendant guilty of assault and battery, and in your opinion the offense does not merit a fine exceeding $50.00, but a fine of $50.00 or less, then all you need report in your verdict is; "We, the Jury, find the Defendant guilty of assault and battery", as you may determine from the proof in the case, and the Court can, in its discretion, assess a fine of $50.00 or less and impose imprisonment not exceeding one year in duration. In which event, the judgment will be remanded to the Juvenile Court for disposition and the place of confinement shall be determined by the Juvenile Court Judge.

If you find the Defendant not guilty of any of the offenses herein defined and explained to you, to-wit: rape, attempt to commit the felony of rape, or assault and battery, or, if you in view of all the proof have a reasonable doubt of the Defendant's guilt or innocence of any of the offenses above mentioned, you should acquit the Defendant and not guilty should be your verdict. Should you convict the Defendant of any offense you must designate that offense in your verdict and fix his punishment as hereinbefore pointed out and explained to you.

You enter upon this investigation with the presumption that the defendant is not guilty of any crime, and this presumption stands as a witness for him until it is re- [fol. 334] butted and overturned by competent and credible proof sufficiently strong to satisfy you beyond a reasonable doubt that the Defendant is guilty of the offense which has been heretofore defined and explained to you.

By reasonable doubt is not meant that which of possibility may arise, but is that doubt engendered by an investigation of the whole proof and an inability, after such an investigation, to let the mind rest easily upon the certainty of guilt. Absolute certainty is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense charged in the indictment.

It must, therefore, appear to your satisfaction by competent and credible proof beyond a reasonable doubt before the Defendant can be convicted: first, that the Defendant committed the offense with which he is charged in the indictment. Second, that the offense was committed in Davidson County before the finding of the indictment. Third, that it was done in such manner and under such circumstances as to make the Defendant guilty of the offense heretofore defined and explained to you.

You must not imagine that the Court has any opinion in regard to the facts, for it is your duty to find them, and I have attempted to read this charge so as to define [fol. 335] to you the law without indicating any opinion about the facts whatever.

There are several means of impeaching a witness, one being to show by the proof that the witness has, at different times, made conflicting statements as to the material facts of the case as to which he testifies. Still another mode is, by rigid and close examination, to involve him in contradictions and discrepancies as to the material facts stated by him. Immaterial discrepancies or differences in the statements of witnesses do not necessarily affect their credibility unless there is something to show that they originate in wilful falsity, and you, Members of the Jury, are to determine how far the testimony of any impeached witness has been impaired by any contradicting process.

You will take all the evidence adduced by the State and by the Defendant and give it a full, fair, and impartial consideration. If there are conflicts in the statements of different witnesses, it is your duty to reconcile them if you can, for the law presumes that every witness has sworn the truth, but if you cannot, the law makes you the sole and exclusive judges of the credibility of the witnesses and the weight to be given their testimony.

In forming your opinion as to the credibility of witnesses you may look to the proof, if any, of his general character, the manner and demeanor of the witness, the [fol. 336] consistency or inconsistency of his statements, their probability or improbability, his ability or willingness to speak the truth, his intelligence and means of knowledge, and his motive to speak the truth or swear a falsehood.

When the defendant goes upon the witness stand and testifies in his own behalf, you will apply the same rule to him that you apply to the other witnesses in determining what weight should be given to his testimony; and where a good character is proven by the defendant it may be looked to for two purposes: First, it becomes a witness for him, greatly strengthening the presumption of his innocence; and second, it may be looked to in considering what weight should be given to his testimony as a witness.

I further instruct you, Members of the Jury, that the only matters proposed for your consideration and deliberations with reference to the facts in this case are what you heard from witnesses and testimony adduced in open Court. Members of the Jury, I again remind you and instruct you, as I have on occasions during the trial of this case, that statements and comments of the attorneys, either for the State or for the defense, do not constitute evidence and are no to be considered by you as such. Questions asked by the attorneys, for either the State or the defense, are not evidence, nor the contents of the questions or statements by attorneys are to be considered or [fol. 337] given any weight; and I further instruct you that you shall only consider as evidence those facts testified to by the witnesses while on the stand and shall only

consider such testimony as was admitted for your consideration by the Court in the presence of all the parties.

Members of the Jury, the indictment in this case is herewith handed to you, together with the charge. You may now retire and consider your verdict.

(Jury retires to consider verdict)

(Jury comes back into the courtroom)

THE COURT: Members of the Jury, I have been advised that there is a question that you wish to ask the Court as to a proposition of law? I will have to instruct you that I can only answer questions relative to the law, not a question of fact. Is your question a question of law, or fact?

FOREMAN: Law.

THE COURT: All right, sir, and what is your question, please?

FOREMAN: I'd like to give my interpretation of a statement in the charge, and please tell me whether I am right or wrong.

THE COURT: Which page are you on?

FOREMAN: Page 5.

THE COURT: What is your question, please.

JUROR: First paragraph. My interpretation is it's [fol. 338] not the Jury's duty to set a specific number of years.

THE COURT: The first portion of the charge addresses itself to the charge of rape, and the punishment for rape is death by electrocution, or if the Jury, in their discretion, commutes the sentence, and if you commute it to a sentence, it must be for a period of life, or some period of time not less than ten years. You may fix it between a period of ten years to life, in your discretion.

Now, is that the answer to your question?

JUROR: Yes, sir.

THE COURT: And if you determine the guilt upon that count in the charge, then the Defendant, it is pointed out, would be sentenced to the State Training and Vocational School for Boys, as further defined in the charge.

Does that answer your question, sir?

JUROR: It answers my question.

THE COURT: All right. Are there any other questions as to the law? If not, then, Members of the Jury, you may return to the Jury Room for further consideration.

(Recess while the Jury deliberates further)

VERDICT

THE COURT: Do you waive the polling of the Jury for the State?

Atty. Gen.: Yes, sir.

[fol. 339] THE COURT: Mr. Looby?

MR. LOOBY: Yes, sir.

THE COURT: Members of the Jury, have you reached a verdict?

FOREMAN: Yes, your Honor!

THE COURT: And what is your verdict, please?

FOREMAN: We, the Jury, find the Defendant guilty of rape, and fix his punishment in the prison of the State Vocational School for Boys for 20 years.

THE COURT: 20 years? You the Jury find the Defendant guilty of the charge of rape, and fix his punishment at 20 years in the State Training Vocational School for Boys?

Members of the Jury, you will be polled, and the clerk will now call your name.

(Clerk polls the Jury)

(The Court questions each juror if that is his verdict)

THE COURT: The verdict of the Jury shall become the judgment of the Court. Mr. Officer, you will hand the Court the indictment, together with a copy of the charge.

(Officer hands papers to the Court.)

THE COURT: The Defendant, Archie Nathaniel Biggers, will rise.

(Defendant rises)

THE COURT: It is the judgment of this Court that [fol. 340] you be sentenced to the State Training Voca-

tional School for Boys for a period of 20 years, upon a charge of rape.

I will allow you thirty days on your motion, Mr. Looby.

MR. LOOBY: You will allow us thirty days on a motion for a new trial.

THE COURT: Yes, sir, I will allow you thirty days on a motion for a new trial.

Members of the Jury, you may now be excused. The Court, as well as Counsel for the State and the Defendant wishes to express to you appreciation for your patience and deliberation of this case.

(Jury leaves the room)

(Whereupon, Court is adjourned for the day)

[fol. 341]

[Reporter's Certificate to foregoing transcript omitted in printing]

[fol. 342] The Defendant tenders this his Bill of Exceptions to the action of the Court in overruling his motion for a new trial, which is ordered signed, sealed, and made a part of the record.

This the 24 day of June, 1966.

/s/ Raymond H. Leathers
Judge
Criminal Court of
Davidson County, Tennessee,
Division One

Approved for Entry:

/s/ John J. Hollins
For the State

/s/ Z. Alexander Looby
For the Defendant

For the Defendant

[File Endorsement Omitted]

[fol. 342a]

IN THE CRIMINAL COURT OF
DAVIDSON COUNTY, TENNESSEE
DIVISION ONE

EXHIBIT # 1 TO TESTIMONY OF FRANK LEE RITTER

THE NASHVILLE TENNESSEAN
Nashville, Tenn., Tuesday Morning, Aug. 17, 1965

Woman Calls Police, Says Youth, 16, Is Her Attacker

By JERRY THOMPSON

A burly, 16-year-old Negro youth picked up early today was identified by a middle-aged woman as the man who tried to rape her at her Bordeaux home last night, police said.

Lee Cathy, Metro homicide officer, said the victim identified the man, but that "a lot of other things" remain to be cleared up.

The suspect emotionally denied the attack.

Officers said the suspect, wearing a soaked, blood-stained blue service station uniform, broke away after a struggle with a woman who screamed and used elements in the Mickey Mantle order, officers said.

He had not been charged early this morning, but police said they planned to confront him with persons involved in the earlier incidents.

The Bordeaux attacker was cut when he broke glass in a door of the home of his intended victim, officers said.

THE SUSPECT had been brought to General hospital for treatment of a cut on his right wrist, which he said he received when he fell on Hogal Street and 16th Avenue North.

The young female mother, who herself was in the hospital, said he had attempted to [illegible]

Woman Calls

(Continued from Page One)

ing cuts from the broken glass. The man grabbed her and tried to force her back inside the house, blacking her eyes in the struggle.

The man fled when the woman's screams attracted neighbors.

Officers said the man fled toward the Cumberland River but apparently doubled back toward the scene of the attack and escaped.

ABOUT 10 minutes before the attack occurred at 10:30 p.m., police received a call that a Negro man was walking the street on which the victim's home is located.

Officers were sent to investigate, but the caller had given a non-existent address, officers reported.

The woman was alone in the house. Her husband was at work.

A NEXT-DOOR neighbor said he heard screams and saw the woman fighting with the man on her lawn. By the time he got a pistol and ran outside, the neighbor said, the man had fled.

The woman was treated for shock and cuts at Baptist Hospital, and released.

Several hours after the attack occurred, residents were patrolling the neighborhood with shotguns and rifles.

[fol. 343]

IN THE SUPREME COURT OF TENNESSEE
FROM THE CRIMINAL COURT OF
DAVIDSON COUNTY, TENNESSEE
DIVISION 1

No. ———

[File Endorsement Omitted]

ARCHIE NATHANIEL BIGGERS, PLAINTIFF IN ERROR

vs.

THE STATE OF TENNESSEE, DEFENDANT IN ERROR

ASSIGNMENTS OF ERROR—Filed November 7, 1966

* * * * *

[fol. 347] 1.

The trial court erred in overruling the first and second grounds of defendant's motion for a new trial which were, in words and figures, to-wit, as follows:

"1. There is no evidence to support the verdict.
2. The verdict is contrary to the law and the evidence in this cause." (R. 14, 32)

This was error and prejudicial to the defendant because the alleged identification of defendant by the prosecutrix on August 17, 1966 was so clearly vague, uncertain and unsatisfactory and was given under such circumstances as not to have any substantial probative value, (BE 17-19) so that defendant's conviction solely on such evidence deprives him of due process of law secured by Article I Section 8 of the Constitution of Tennessee and the Fourteenth Amendment to the Constitution of the United [fol. 348] States, and is therefore unconstitutional and void.

2.

The trial court erred in overruling the third and fourth grounds of defendant's motion for a new trial, which were in words and figures, to-wit, as follows:

"3. That the evidence preponderates against the verdict of the jury and in favor of the innocence of the defendant.

4. The State failed to prove its case beyond a reasonable double." (R. 14, 32)

This was error and prejudicial to the defendant because there was absolutely no evidence connecting defendant with the offense except the insubstantial identification made by the prosecutrix on basis of vague and general physical characteristics similar to those previously published in newspaper report alleging defendant's arrest and alleging his identification by another woman as her attempted attacker; (BE 17-19; See Exhibit put into record not shown to Jury, August 17, 1965 Addition of the Nashville Tennessean) and said vague and questionable identification, uncorroborated by any other evidence, was clearly insufficient to overcome the defendant's positive denial of guilt, supported by substantial and uncontroverted evidence of his good character and reputation for truth and veracity. (BE 150-262)

3.

The trial court erred in denying defendant's motion for a mistrial on the ground that the testimony of State's witness, Officer Tom Cathey, patently referring to defendant's arrest and investigation in connection with another case or cases immediately prior to his alleged identification by the prosecutrix in this case, was highly improper and prejudicial to the defendant. (BE 65-67, 79-81) This was manifestly error and prejudicial as tending to suggest to the jury defendant's investigation and possible guilt in other cases as a basis for corroboration of the weak identification offered by the prosecution in the case at bar. This was made the basis of the fifth ground of defendant's motion for new trial, (R. 14) as amended and supplemented, (R. 17-27) which was disallowed by the trial court and to which action of the court in disallowing said [fol. 349] motion the defendant excepted. (R. 32-33)

4.

The trial court erred in denying defendant's motion for a mistrial on the ground of inflammatory and prejudicial remarks of the prosecuting attorney in his summation to the jury suggesting that because prosecutrix was a Negro woman he would not have been brought to trial in states south of the State of Tennessee and relating her reproductive organs to those of a dog. (BF 276-277) This was error because said argument was manifestly improper and calculated to unduly inflame and prejudice the jury and unduly motivate its conviction of defendant on bases other than evidence introduced in the case. The conviction of defendant on such insubstantial evidence and the extreme and excessive punishment fixed by the jury clearly demonstrate the prejudicial effect of said improper argument. (BE 292) This was made the basis of the sixth and seventh grounds of the defendant's motion for new trial, (R. 14-15) as amended and supplemented, (R. 17, 27-31) which was disallowed by the trial court, to which action of the court in disallowing said motion the defendant excepted. (R. 32-33)

5.

The conviction of defendant solely on the basis of an identification by prosecutrix predicated on his being required to make statements reenacting the circumstances of the offense while in custody without benefit of counsel or warning of his right to have an attorney with him and to remain silent, is unconstitutional and void as violating rights of defendant secured by the Fifth and Fourteenth Amendments to the Constitution of the United States in that said speech by defendant was, in effect, testimony against himself involuntarily given by a juvenile under circumstances so fundamentally unfair and oppressive as to invalidate all evidence flowing therefrom under said constitutional provisions. (BE 93-116) This assignment of error was not specifically made the basis of a ground of defendant's motion for new trial because the constitutional law pertaining thereto was not clear at the time [fol. 350] said motion was prepared and heard, same hav-

ing been declared by the Supreme Court of the United States on June 13, 1966 in the case of Miranda vs. Arizona 86 S.Ct. 1602.

6.

The trial court erred in refusing to require the State to defray the cost of preparation of defendant's Bill of Exceptions in the light of the recent decision of this court in the case of Russell vs. State (1965) 401 S.W.2d 586. This was made the basis of a post-trial motion by the defendant which was overruled and denied by the trial court. (R. 36-37) This was error because the record adequately reflects that defendant is a juvenile who was not working and that his mother and stepfather were of the working class. (BE 175-193) Their employment of private counsel, standing alone, did not justify the court's refusal to require the State to furnish a transcript, to which action of the court defendant excepted. (R. 36-37)

* * * *

[fol. 359]

* * * *

LOOBY & WILLIAMS

By /s/ [Illegible]
Attorneys for the Defendant

[Certificate of service (omitted in printing)]

[fol. 380]

IN THE SUPREME COURT OF TENNESSEE
DAVIDSON CRIMINAL

[File Endorsement Omitted]

ARCHIE NATHANIEL BIGGERS, PLAINTIFF IN ERROR

vs.

THE STATE OF TENNESSEE, DEFENDANT IN ERROR

APPEAL IN ERROR FROM THE CRIMINAL COURT OF DAVIDSON COUNTY

HONORABLE RAYMOND H. LEATHERS, Judge

For Archie Nathaniel Biggers

HONORABLE AVON WILLIAMS, Of Counsel, Looby and Williams of Nashville, Tennessee

For the State of Tennessee

Assistant District Attorney General JOHN HOLLINS
Assistant State Attorney General ROBERT HEDGEPATH

JUDGMENT AFFIRMED

JUSTICE ROSS W. DYER

[fol. 381]

* * * *

OPINION—January 12, 1967

Plaintiff in error, Archie Nathaniel Biggers, herein referred to as defendant, appeals from a conviction of rape for which he has been sentenced to serve twenty years (20) years in the State Vocational Training School for Boys. Defendant at the time of the crime was sixteen years old.

The victim, Mrs. Margaret Beamer, is a married woman with five children. On the night of 22 January 1965 she was at home in her living room sewing. About 9:00 p.m.

she started from her living room to the bed room, which rooms are separated by a hall, and as she reached the hall defendant, with a butcher knife in his hand, grabbed her from behind pulling her to the floor. Her screams brought her daughter out of a bedroom into the hall and when the daughter saw what was happening she also began to scream. Defendant said to Mrs. Beamer, "You tell her to shut up or I'll kill you both." Mrs. Beamer ordered the daughter back into the bedroom. Defendant escorted Mrs. Beamer out the back door of the house to a spot about two blocks away where he had sexual relations with her. Upon completion of the sexual act defendant ran away and Mrs. Beamer, returning home, notified police. About 10:15 p.m. on this night Mrs. Beamer was medically ex- [fol. 382] amined which revealed she had had sexual intercourse within three (3) hours prior to that time.

During the early hours of 17 August 1965 defendant was arrested for an incident occurring on this night of his arrest and immediately taken to Juvenile Aid. Defendant's mother came to Juvenile Aid and in her presence he was fully advised of his constitutional rights. Later on in the morning defendant was released to the Police Department and Mrs. Beamer, at Police Headquarters, identified defendant as the person who raped her on 22 January 1965.

Defendant as a witness in his own behalf denied any knowledge of the crime. Several witnesses testified to his good character.

The assignments of error are as follows:

1. The evidence preponderates against the verdict of the jury and in favor of the innocence of the accused.
2. The defendant was prejudiced when a witness for the State mentioned other offenses allegedly committed by the defendant for which he was not on trial and for which he had not previously been convicted.
3. The defendant was prejudiced when the Attorney General went outside the evidence in the case while making his final argument to the jury.

4. The defendant was required to give evidence against himself without having been advised of his constitutional rights.
5. The defendant was prejudiced by the action of the Trial Court in refusing to require the State to furnish him a transcript of the trial proceedings.

The first assignment of error is predicated upon the ground the identity of defendant by the victim was so [fol. 383] vague, uncertain and unsatisfactory and given under such circumstances as not to have any substantial probative value. This identification was made based upon the defendant's size, voice, skin texture and hair. On identification the trial judge asked the victim, "All right. Is there any doubt in your mind." To which the victim replied, "No, there's no doubt." Identification is a question of fact for the jury. *Stubbs* v. *State* 216 Tenn. —— 393 SW2d 150 (1965). The first assignment of error is overruled.

Under the second assignment of error it is alleged Thomas E. Cathey a member of the Metropolitan Police Department, as a witness for the State, mentioned other offenses allegedly committed by defendant. In defendant's brief these references to other crimes are described as being "by inference." We have carefully examined the pages of the transcript cited and find no reference to other crimes. The assignment of error is overruled.

Objection is made, under the third assignment of error, to the following argument by the Assistant District Attorney General:

> In many parts of our United States, Gentlemen of the Jury, a case of this nature would never go to trial, and I am sorry to say, its all south of the State of Tennessee, and that is because of this fine woman, Mrs. Beamer's environment, economic circumstances, and situation, she is not considered in those states to have any more rights than a dog and her reproductive organs—".

The argument above was not completed due to the objection by defendant which was sustained by the court.

[fol. 384] The Assistant District Attorney General did not pursue this line of argument further. Both the defendant and the victim were members of the Negro race a fact, of course, known to the jury. It is insisted, under these circumstances, this argument was an appeal to racial prejudice. We agree this line of argument was improper, but in light of the prompt action of the trial judge we think such was harmless error. The third assignment of error is overruled.

Mrs. Beamer and defendant, for the purpose of possible identification, were brought together at Police Headquarters. Mrs. Beamer requested police have defendant repeat in her presence some of the words her assailant had used at the time of the rape. The words requested were, "Stop or I'll kill you." Defendant, upon instructions of police, repeated these words and Mrs. Beamer bases her identification of defendant as her assailant partly upon his voice. Under the fourth assignment of error it is alleged requiring defendant to speak these words for the purpose of identification violated his constitutional right against self-incrimination.

While the exact problem presented here has not been before this Court, yet we think it is controlled by the logic and reason used by the court in the case of *Barrett* v. *State*, 190 Tenn. 366, 229 SW2d 516 (1950). The *Barrett* case involved a defendant required to wear a hat at the time he was being identified. This court, rejecting the argument such was a violation of defendant's privilege against self-incrimination, quoted from *Wigmore on Evidence*, 3 Ed., Section 2265, p. 375 as follows:

> Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, demand made upon him is not a testimonial one."
> 190 Tenn. 372

[fol. 385] A thorough analysis of the problem presented can be found in 8 *Wigmore on Evidence*, sec. 2265, at pp. 386, 396 (McNaughton, rev. 1961). In analyzing this constitutional privilege Dean Wigmore lists eleven (11) prin-

cipal categories which he specifically states are not covered. Category No. 7 is; "Requiring a suspect to speak for identification." A number of cases are cited for the proposition a defendant's rights are not violated when he is forced to speak certain words solely for the purpose of identification. See above citation in Wigmore.

In the instant case defendant was told what words to say and in repeating them he did not give any factual information tending to connect him with the crime; nor could any reliance be placed on these words which would indicate defendant was conscious of, or had knowledge of, any facts of the crime. The only thing he gave was the sound of his voice to be used, along with other things, solely for the purpose of identification. Under these circumstances we do not think defendant's constitutional right against self-incrimination was violated. The fourth assignment of error is overruled.

Under T.C.A. 40-2037 et seq. the State is required to furnish to an indigent defendant a transcript upon request. The trial judge determines if the defendant is indigent and in this case determined defendant was not indigent. We find no error in this determination by the trial judge. The fifth assignment of error is overruled.

Judgment affirmed.

/s/ Ross W. Dyer, J.

Burnett, CJ; Chattin & Creson, JJ;
Harbison, SJ;

Concur

[fol. 386]

IN THE SUPREME COURT OF TENNESSEE

NASHVILLE

MB 47/226

Davidson Criminal
Affirmed.

ARCHIE NATHANIEL BIGGERS

vs.

STATE OF TENNESSEE

JUDGMENT—January 12, 1967

Came the plaintiff in error in proper person and by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Davidson County; and on consideration thereof, this Court is of opinion that there is no reversible error on the record, and the judgment of the Court below should be affirmed; and it is accordingly so ordered and adjudged by the Court.

It is, therefore, ordered by the Court that the plaintiff in error, for the offense of rape as charged in the indictment, be delivered to the Superintendent of the State Vocational School for Boys, or his agent, and be by him conveyed to the State Vocational School for Boys, and there confined for a period of twenty years, commencing on the date of his delivery to the keeper thereof, subject to the rules and regulations of said institution.

It is further ordered by the Court that plaintiff in error be rendered infamous and disqualified from holding any office under this State or exercising the elective franchise. [fol. 387] The State of Tennessee will pay the costs of this cause; and certification of the cost of the appeal will issue from this Court in the manner provided by law. A procedendo will be issued to the said Criminal Court of Davidson County directing that Court to proceed with the

improper, the Court rejected petitioner's fourth assignment of error based thereon, holding that the error was harmless. (Opinion, pages 3-4)

The Court found no error in the ruling of the Trial Court that petitioner was not an indigent, and in refusing to require the State to furnish a transcript under TCA Section 40-2037 et seq. and rejected petitioner's assignment of error number 6 complaining of said ruling, (Petitioner's original Brief filed in this Court, page 8) apparently holding, in effect, that this was a determination to be made by the Trial Judge, not subject to appellate review. (Opinion, 5th page)

[fol. 390] II.

The holding of this Court, in effect, that the determination of the Trial Court regarding the defendant's indigency under TCA Section 40-2037 is not subject to appellate review, seems directly contrary to the purpose of this statute which was to assure and protect the rights of an indigent defendant to appellate review. The record and the affidavit filed with his Assignments of Error and Brief on Appeal clearly establish the fact of petitioner's indigency. Further, the below additional affidavit filed with this petition further reflects that fact. Defendant has remained confined in jail since August 17, 1965 to this day. This Court's apparent holding that the judicial determination on the issue of indigency itself is not subject to appellate review can and will effectively defeat the liberal purpose of the above statute requiring an indigent defendant to be furnished a transcript of the evidence at State expense in connection with an appeal. Moreover, in this case, as more fully discussed hereinafter, the ruling of the Trial Court denied petitioner a complete transcript including the voir dire, thereby arbitrarily depriving him of an effective right of appeal in violation of his rights secured by the Fourteenth Amendment to the United States Constitution.

III.

The conclusion of the Court that an appeal by the Attorney General to racial prejudice during argument in a

rape case wherein the record shows that there was wide newspaper publicity given in the community at time of the petitioner's arrest, purporting to connect him with a series of sexual assaults upon both white and Negro women (See the Nashville Tennessean, dated August 17, 1965 introduced as Exhibit 1 in the record; BE 146-147) seems to overlook, it is respectfully submitted, the realities of racial attitudes on this subject, of which the Court can and should take judicial notice. The voir dire in this case occupied a full three days, during which a large number of jurors were rejected because of having formed prejudicial opinions based on this very newspaper publicity. Some of the jurors accepted on the jury admitted they had been [fol. 391] exposed to this publicity but either denied having formed definite opinions or recollection of the details. Because of the very indigency of the petitioner which the Trial Court denied, he was prevented from obtaining a transcript on appeal of this extensive voir dire, and would have been prevented from having any transcript at all on the appeal had his counsel not advanced funds with which to pay for same. Petitioner attaches hereto an affidavit which supports in abbreviated form his foregoing statements regarding the attitudes of jurors and his inability to furnish a transcript of the voir dire on appeal. He sincerely urges that in the light of these circumstances, it is clear that the racially inflammatory argument of the Attorney General on the trial was prejudicial to him and that his assignment of error on that ground should have been sustained.

IV.

In reference to petitioner's fifth assignment of error, the Court apparently overlooked and petitioner now calls to its attention his contention that the conviction based on said identification violated his rights secured by the Fourteenth Amendment to the United States Constitution not only because the circumstances rendered same involuntary and self-incriminating under the Fifth Amendment, but also because "given by a juvenile under circumstances so fundamentally unfair and oppressive as to invalidate all evidence flowing therefrom under said Constitutional Pro-

visions" (Petitioner's original Brief filed in this Court, page 7) Petitioner now again specifically calls the Court's attention to said circumstances which invalidate the identification constitutionally:

a. Petitioner was unlawfully arrested 17 August 1965 by the police without probable cause, while being treated medically at Hubbard Hospital, and detained for the purpose of said identification (See August 17 and 18, 1965 Editions of the Nashville Tennessean filed as Exhibits 1 and 2 but not shown to jury; BE 146-147) in violation of his rights secured by the Fourth Amendment to the United States Constitution as made binding upon the States by the Fourteenth Amendment to said Constitution.

b. Efforts by his counsel to adduce evidence relating to said unlawful arrest and detention at the trial were effec-[fol. 392] tively thwarted by the Trial Court over the objection of his counsel, which action of the Trial Court in itself constituted a denial of petitioner's rights secured by the due process clause of the Fourteenth Amendment to the Constitution of the United States. (BE 70-79; 93-101)

c. Petitioner was a juvenile, sixteen years of age, and was effectively denied his statutory right under Tennessee Code Annotated Section 37-252 to be taken directly before the Juvenile Court and his further right, under Tennessee Code Annotated Section 37-265 to have the Judge of the Juvenile Court exercise his exclusive jurisdiction to investigate and make the determination whether or not there was probable cause to believe that petitioner had been guilty of the crime of rape as a prerequisite to release from the protective custody of said Juvenile Court. Denial of these rights secured by State Law deprived him of his right to be secure against arrest and detention of his person without probable cause, as provided by the Fourth Amendment to the United States Constitution and made binding upon the States through the Fourteenth Amendment to said Constitution, and also deprived him of due process of law secured by said Fourteenth Amendment. (BE 93-101)

d. The action of the Trial Court in refusing to allow counsel for defendant to develop evidence showing more

fully the deprivation of the foregoing rights under said Tennessee Juvenile Court Statute, likewise deprived defendant of due process of law secured by the Fourteenth Amendment to the Constitution of the United States. (BE 99-101)

e. The identification of petitioner by prosecutrix was obtained by the police during or immediately after, and as a result of said arrest and unlawful detention without probable cause and without taking him before the Juvenile Judge who had exclusive jurisdiction to determine probable cause. (BE 74-79; 97-101) Therefore the admission in evidence of and the conviction based solely upon said identification was unconstitutional and void as depriving the petitioner of rights secured by the foregoing Constitutional Provisions.

[fol. 393] f. The identification of petitioner by prosecutrix, under the above circumstances, without giving him the benefit of being placed in a line-up and requiring him, in connection therewith, to enact a portion of the scene of the crime under instructions by the police constitutes an unlawful search and seizure of evidence from his person and a violation of his privacy within the protection of the Fourth Amendment to the United States Constitution as made binding upon the State through the Fourteenth Amendment.

g. Such identification at a time when petitioner had been unlawfully removed from the protective custody of the Juvenile Court and had not been offered or afforded an opportunity to have counsel present, and no counsel was present, violated his right to counsel secured by the Sixth Amendment to the United States Constitution as made binding upon the State through the Fourteenth Amendment.

V.

In reference to petitioner's first assignment of error, which the Court apparently (and petitioner contends—erroneously) dealt with as being identical with his second assignment of error, petitioner respectfully insists that an appellate determination whether or not there was any competent evidence as a matter of law to support the verdict

required a qualitative appraisal of the evidence relating to the manner in which the prosecutrix arrived at her alleged identification. The acceptance by the Court of her conclusionary statement that "there's no doubt" in her mind, without consideration of her uncontroverted testimony as to the unreliable manner in which she reached said conclusion amounts, in effect, to a denial of petitioner's right to have this Court determine whether or not there was any evidence at all to support the verdict, as sought by his first assignment of error. Further, in reference to the second assignment of error, petitioner avers that, although it is true that identification, like many other matters, is a question of fact for the jury, his said assignment goes beyond that general proposition and invokes the power and duty of this Court to weigh the evidence qualitatively as well as quantitatively to determine [fol. 394] whether the evidence preponderates in favor of his innocence and against his guilt. He reiterates here his contention that, when so weighed, the preponderance in favor of his innocence is clear.

VI.

Petitioner prays that the affidavit referred to hereinabove, attached hereto and marked Exhibit A, together with his Brief filed herewith in support of this Petition for Rehearing, all be deemed and treated a part of this Petition.

Petitioner further prays that this Honorable Court, in view of the foregoing, will grant a rehearing of this case, to the end that the judgment and opinion announced the 12th day of January, 1967, will be reversed and set aside, and the case remanded and the indictment dismissed, and that petitioner's counsel be reimbursed for the amount which they expended in paying for the transcript on appeal, all in accordance with petitioner's original Assignments of Error and Brief filed on this appeal.

LOOBY & WILLIAMS

By /s/ [Illegible]
Attorneys for Petitioner

[Certificate of service (omitted in printing)]

[fol. 395]

EXHIBIT A TO PETITION FOR REHEARING

IN THE SUPREME COURT
OF THE STATE OF TENNESSEE

FROM THE CRIMINAL COURT OF
DAVIDSON COUNTY, TENNESSEE

DIVISION 1

ARCHIE NATHANIEL BIGGERS, PLAINTIFF IN ERROR

vs.

THE STATE OF TENNESSEE, DEFENDANT IN ERROR

AFFIDAVIT OF Z. ALEXANDER LOOBY

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Z. Alexander Looby, after being duly sworn according to law, deposes and says:

That he was the chief counsel for the plaintiff in error, Archie Nathaniel Biggers, in the trial of the above case in Division I of the Criminal Court of Davidson County, Tennessee which began on 29 November 1965 and ended on 3 December 1965. That the selection of a jury entailed the voir dire of well over one hundred veniremen, and a special venire of a one hundred-eleven prospective jurors had to be subpoenaed by the Court for 1 December 1965 in order to complete the selection of the jury. The majority of the veniremen admitted on voir dire that they had read newspaper reports about the arrest of the plaintiff in error on several charges of rape in the Fall of 1965. Many of them were excused for cause on their admissions that they had formed opinions as to guilt or innocence of plaintiff in error on the basis of said news reports. Some of these seated on the jury which tried the case admitted on voir dire that they had read such news reports but

stated either that they had no recollection of details thereof or that they had formed no opinions as to guilt or innocence.

The deponent further deposes and says that the plaintiff, Archie Nathaniel Biggers, has and had at time of trial no real estate or other valuable property, and was unemployed, having been confined to jail since his arrest on 17 August 1965. He has remained in jail to and in-
[fol. 396] cluding the date of this Affidavit. His mother, Mrs. Flora Marie Hammonds, likewise had and has no valuable property, and is and has been for many years a domestic servant earning approximately $37.50 per week. The plaintiff in error has no father, he having been born out of wedlock.

The foregoing facts relating to the indigency of the plaintiff in error were stated, in substance, to the Trial Judge upon the hearing of the motion for new trial in said case and also upon the hearing of the post-trial motion by plaintiff in error seeking a reconsideration of the Trial Court's action in denying plaintiff in error a state-furnished transcript of the evidence. The above mentioned voir dire examination of prospective jurors would have required several hundred pages to be transcribed. Plaintiff in error and his mother were unable even to pay for a transcript of the evidence itself, so that the deponent was compelled to advance payment for said transcript of the evidence. Counsel was unable to advance the sum necessary for transcription of said extensive voir dire and was therefore substantially hindered in preparation of the motion for new trial and the appeal in this case insofar as questions relating to prejudice of the jury are concerned. The jury which tried this case was composed entirely of white persons, due to the action of the District Attorney General in challenging peremptorily all Negro veniremen whom he was not able to excuse for cause. One Negro venireman was permitted by the Court to be challenged peremptorily by the State after the State and the plaintiff in error had accepted twelve jurors, the Trial Court permitting the State to reopen its examination of

the veniremen and replace this Negro venireman with a white person by exercising said peremptory challenge.

Further deponent saith not.

/s/ Z. Alexander Looby

Sworn to and subscribed before me this the 23rd day of January, 1967.

/s/ [Illegible]
Notary Public
My Commission Expires: 7-22-67

[fol. 405]

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DAVIDSON CRIMINAL

[File Endorsement Omitted]

ARCHIE NATHANIEL BIGGERS, PLAINTIFF IN ERROR

v.

STATE OF TENNESSEE, DEFENDANT IN ERROR

REPLY TO PETITION TO REHEAR—Filed January 25, 1967

MAY IT PLEASE THE COURT:

The original opinion was filed by this Court on January 12, 1967. A petition for rehearing pursuant to Rule 32 of this Court has been timely filed. However, there is no new argument made nor does the defendant point out any material fact overlooked by this Court in its opinion. This, of course, means that this petition must be denied. Rules of the Supreme Court, Rule 32.

A number of specific items are mentioned in the petition for rehearing which point out the defendant's desire

[fol. 406] to reargue his case. It is complained that the Court failed to comment upon the petitioner's first assignment of error. The first assignment of error, of course, related to the evidence and was ruled on by this Court in its opinion at page 3. The defendant also complains that the Court erroneously ruled that the question of identification was for the jury. It is, of course, for the jury to determine all of the evidence. This Court reviews the record in order to determine whether or not the evidence preponderates against the jury's findings. It was decided in this case that the evidence supported the conviction of the defendant.

Apparently the defendant misunderstands the original reply brief of the State and the Court's opinion with regard to the voice identification problem raised in this appeal. The defendant complains that the requirement that the defendant say certain words was unfair and oppressive in violation of the United States Constitution. This, of course, was answered by the Court in its reliance upon *Barrett* v. *State*, 190 Tenn. 366, and *Wigmore on Evidence* to the effect that the requirement that the defendant speak is not a confession but merely an act for purposes of identification.

It is forcibly asserted that the defendant was prejudiced by his inability to have a record in this case. This, of course, is absurd inasmuch as the Trial Judge found that [fol. 407] the defendant was not indigent and in view of the fact that a record of the trial was obtained. Counsel for the defendant maintain that they financed the bill of exceptions in this case but, of course, they had to do so with the expectation that they would be repaid.

In view of the foregoing it is the recommendation of the State that the petition to rehear be denied.

Respectfully submitted,

/s/ George F. McCanless
Attorney General

/s/ Robert F. Hedgepath
Assistant Attorney General

[Certification of Service (omitted in printing)]

[fol. 408]

IN THE SUPREME COURT OF TENNESSEE

DAVIDSON CRIMINAL

[File Endorsement Omitted]

ARCHIE NATHANIEL BIGGERS, PLAINTIFF IN ERROR

vs.

THE STATE OF TENNESSEE, DEFENDANT IN ERROR

ORDER DENYING PETITION TO REHEAR—
Filed March 1, 1967

Plaintiff in error has filed a petition to rehear as result of our original opinion filed 12 January 1967. Rule 32 of this court, inter alia, states:

> A rehearing will be refused where no new argument is made, and no new authority adduced, and no material fact is pointed out as overlooked.

Under this rule this petition to rehear is denied.

/s/ Ross W. Dyer, J.

Burnett, CJ; Chattin & Creson, JJ;
Harbison, SJ;

Concur

[fol. 408a]

* * * * *

This cause coming on further to be heard on a petition to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of petitioner. 3/1/67.

[fol. 410]

[Clerk's Certificate to foregoing transcript omitted in printing.]

Office-Supreme Court, U.S.
FILED
APR 1 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] No. 237

ARCHIE NATHANIEL BIGGERS,

Petitioner,

—v.—

STATE OF TENNESSEE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioner

JOHN P. HOWLAND
500 East 73rd Street
New York, New York
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1966

No. .....

ARCHIE NATHANIEL BIGGERS,

Petitioner,

—v.—

STATE OF TENNESSEE,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above entitled cause January 12, 1967, rehearing of which was denied March 1, 1967.

Citation to Opinion Below

The opinion of the Supreme Court of Tennessee is unreported and is printed in the appendix hereto, *infra*, p. 1a. The opinion of the Supreme Court denying rehearing is unreported and appears in the appendix hereto, *infra*, p. 6a.

Jurisdiction

The judgment of the Supreme Court of Tennessee was entered on January 12, 1967, *infra*, p. 1a. Rehearing was denied March 1, 1967, *infra*, p. 6a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3),

petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Question Presented

The petitioner, a 16 year-old Negro boy, was compelled by the police, while alone in their custody at the police station, to speak the words spoken by a rapist during the offense almost eight months earlier for voice identification by the prosecutrix.

Was the denial of petitioner's right to personal dignity and integrity by the police, and the failure to give him benefit of counsel, provide him with a line-up, or with any other means to assure an objective, impartial identification of his voice by the prosecutrix a violation of petitioner's Fifth, Sixth and Fourteenth Amendment rights.

Constitutional Provisions Involved

This petition involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Statement

Early on the morning of August 17, 1965, Archie Nathaniel Biggers, a Negro boy of 16 years, was arrested by the police and allegedly identified by a woman as the man who had attempted to rape her earlier that night (Tr. 70). The story appeared on the first page of the only morning newspaper in Nashville, The Nashville Tennessean, describing the defendant as "a burly 16 year-old Negro youth." Petitioner has never been tried on this charge.

Later the same day the police went to the home of Mrs. Margaret Beamer, the Negro prosecutrix, and requested her to accompany them to the police station to "look at a suspect." (Tr. 27-28, 57, 106, 109-110). Mrs. Beamer had been raped on the night of January 22, 1965, almost eight months earlier (Tr. 4-7, 20, 85-88). An intruder had entered her home and grabbed her in an unlit hallway (Tr. 10). Hearing her mother's screams, Mrs. Beamer's daughter ran into the hallway. She approached within a foot of the rapist, whose face was turned toward her, before being ordered by her mother to go back to her bedroom (Tr. 129-132). The intruder then took Mrs. Beamer to a patch of woods where he raped her (Tr. 4-7). Neither Mrs. Beamer (Tr. 13) nor her daughter (Tr. 141) could describe or identify the rapist. Although she once identified a police photograph of a man as "having features" like the rapist (Tr. 14a), Mrs. Beamer's case lay dormant for almost eight months for lack of clues.

When Mrs. Beamer saw Archie Biggers for the first time he was being held at the police station in the custody of five police officers (Tr. 112). Neither his parents nor relatives were present, nor had they been notified of the identification (Tr. 103-104, 111, 155). He had no lawyer. The police brought petitioner in Mrs. Beamer's presence and required him to repeat the words spoken by the rapist at the time of the offense: "Shut up, or I'll kill you" (Tr. 6, 7, 17, 47, 93, 108, 112-113, 156). From the sound of these few words—the record does not reveal that the petitioner said anything else (Tr. 17, 112-113)—spoken eight months earlier during events which lasted from 15 to 30 minutes at most from the time that the prosecutrix left her house until she returned (Tr. 30, 140-141), Mrs. Beamer identified Archie Biggers as the man who had raped her (Tr. 19). It was the same voice she was later

to describe at the trial as that of an "immature youth" who "talked soft" in a "medium-pitched" voice (Tr. 17).

The identification of the petitioner by his voice, general size, and skin and hair texture was the only evidence of petitioner's guilt[1] (Tr. 17-19). Petitioner testified in his behalf and emphatically denied committing the act charged (Tr. 152, 154, 156). His stepfather, mother and seven neighbors took the stand in his support as character witnesses and testified to his excellent reputation for truth, veracity, and good character (Tr. 185-186, 204-205, 210-212, 217-218, 224-226, 233-234, 242-245, 255-257).

On the basis of Mrs. Beamer's identification evidence the jury found Archie Biggers guilty of rape. He was sentenced to the State Vocational Training School for Boys for twenty years (Tr. 292).

How the Federal Questions Were Raised and Decided Below

The question of whether it was a violation of petitioner's Fourteenth Amendment rights to compel him to speak the words spoken by the rapist during the offense for voice identification, without benefit of counsel or minimal procedural protections, was raised for the first time in petitioner's assignment of error and brief on appeal to the Supreme Court of Tennessee filed November 7, 1966 (Ass. of Error and Br. 7, 14). Petitioner requested the Supreme Court of Tennessee to waive its Rule 14(5),[2]

[1] In Tennessee it is not mandatory that testimony of a violated female be corroborated. Tennessee Code Annotated, §39-3701 (1955); *Carroll* v. *State*, 212 Tenn. 464, 370 S.W.2d 523; *King* v. *State*, 210 Tenn. 150, 357 S.W.2d 42.

[2] Rule 14(5) provides:

Motions for new trial and in arrest of judgment essential, when.— Error in the admission or exclusion of testimony, in charging a jury,

and consider the question, although the error assigned had not been made a basis for a motion for new trial.

The pertinent assignment of error was the following:

> 5. The conviction of the defendant solely on the basis of an identification by prosecutrix predicated on his being required to make statements reenacting the circumstances of the offense while in custody without benefit of counsel or warning of his right to have an attorney with him and to remain silent, is unconstitutional and void as violating rights of defendant secured by the Fifth and Fourteenth Amendments to the Constitution of the United States in that said speech by defendant was, in effect, testimony against himself involuntarily given by a juvenile under circumstances so fundamentally unfair and oppressive as to invalidate all evidence flowing therefrom under said constitutional circumstances (Ass. of Error and Br. 7-8, 14-16).

The Supreme Court of Tennessee waived Rule 14(5) and decided the federal question raised by petitioner's assignment of error 5, renumbered 4 by the court, *infra*,

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or refusing further instructions, misconduct of jurors, parties or counsel, or other action occurring or committed on the trial of the case, civil or criminal, or other grounds upon which a new trial is sought, will not constitute a ground for reversal, and a new trial, unless it affirmatively appears that the same was specifically stated in the motion made for a new trial in the lower court, and decided adversely to the plaintiff in error, but will be treated as waived, in all cases in which motions for a new trial are permitted; nor will any supposed matter in arrest of judgment be considered unless it appears that the same was specifically stated in a motion, seasonably made in the trial court, for that purpose, and held insufficient. This is a court of appeals and errors, and its jurisdiction can only be exercised upon questions and issues tried and adjudged by inferior courts, the burden being upon the appellant, or plaintiff in error, to show the adjudication, and the error therein, of which he complains.

pp. 4a, 5a. The court held that the voice identification test had not violated petitioner's constitutional rights against self-incrimination because "the only thing he gave was the sound of his voice to be used, along with other things, solely for the purpose of identification" *infra,* p. 5a.

In his petition for rehearing to the Supreme Court of Tennessee, petitioner renewed the allegations made in his fifth assignment of error. The Supreme Court of Tennessee denied the petition, *infra,* p. 6a, on March 1, 1967.

REASONS FOR GRANTING THE WRIT

I.

Petitioner Was Denied His Rights Under the Due Process Clause of the Fourteenth Amendment and the Fifth and Sixth Amendments to the United States Constitution Under Circumstances Similar to Those in Conflicting Court of Appeals Cases Granted Certiorari and Presently Pending Before This Court.

The facts in this case are starkly simple, but they raise a critical question of the fairness and impartiality of police identification practices. They reveal that Archie Biggers was denied his right to a fair trial by police practices which denied him elementary Fourteenth Amendment protections.

The only evidence against petitioner at trial was the identification made by the prosecutrix, Mrs. Margaret Beamer, that Archie Biggers was the man who had raped her. Biggers, a 16 year old Negro was arrested early on the morning of August 17, 1965 and charged with the attempted rape of another woman (Tr. 70). Later the same day, the police brought Mrs. Beamer, who had been

raped on the night of January 22, 1965, almost eight months earlier (Tr. 4-7, 20, 85-88) to "look at a suspect" (Tr. 27-28, 57, 106, 109-110). Unable to describe or identify her assailant (Tr. 13) her case had remained without clues. Asked to identify Biggers if she could, the first view she had of the petitioner was of him alone in the custody and presence of five police officers (Tr. 112). He had no lawyer. The police then required him to speak the exact words of the rapist spoken during the offense (Tr. 6, 7, 17, 47, 93, 108, 112-113, 156), on the basis of which she identified petitioner as the rapist. These were the circumstances surrounding the identification by the prosecutrix.

The facts in this case raise the issue present in conflicting Second and Fifth Circuit cases which this Court has granted certiorari to determine. *United States ex rel. Stovall* v. *Denno,* 355 F.2d 731 (2nd Cir. 1966), cert. granted 34 U.S.L. Week 3429 (June 20, 1966); *Wade* v. *United States,* 358 F.2d 557 (5th Cir. 1966), cert. granted 35 U.S.L. Week 3124 (Oct. 10, 1966). The Second Circuit, sitting *en banc,* held that the defendant's Fifth, Sixth and Fourteenth Amendment rights were not violated when he was taken to the victim's hospital room for identification without the benefit of a line-up or counsel, even though arraignment had been postponed to allow him to obtain counsel. The Fifth Circuit, in *Wade* v. *United States, supra,* specifically adopted the view of the dissenting judges in *United States ex rel. Stovall* v. *Denno, supra.* It excluded testimony of the line-up on the ground that the line-up had violated the defendant's constitutional rights because two witnesses had seen him in the custody of the police shortly before the line-up, and defendant's counsel had not been notified and was not present at the line-up. Archie Biggers, like Wade, was denied elemental protections against suggestion and the right to counsel during

the test to identify his voice. Indeed, the circumstances of Biggers' identification were less conducive to impartiality than those in *United States* v. *Wade, supra,* and the arguable necessity for speed in identification and difficulty in arranging a line-up involved in *United States ex rel. Denno, supra,* is not present in this case.

As the question presented in this case raises issues similar to issues already pending before this Court, certiorari is appropriate here. Compare *Shelley* v. *Kraemer,* 334 U.S. 1 (1948) with *Trustees of Monroe Avenue Church of Christ* v. *Perkins,* 334 U.S. 813 (1948).

II.

The Facts in This Case Show That Petitioner Was Denied Due Process of Law and the Protection of the Fifth and Sixth Amendments to the Constitution of the United States.

The voice identification of Archie Biggers was made in a manner which could scarcely have been less conducive to an impartial judgment. The sudden arrival of the police to take her to "look at a suspect" (Tr. 27-28, 57, 106, 109-110) the first view of the petitioner in custody of five policemen (Tr. 112) and the repetition of the rapist's words (Tr. 6, 7, 17, 47, 93, 108, 112-113, 156) merged to create an atmosphere charged with suggestion that this man was the rapist. Time, almost eight months, inevitably dulls recollection, and increases the temptation to succumb to suggestion.

The danger which is obvious and inherent in any identification process involving sensory perception by a witness is that extraneous factors may intervene to color and prejudice what should be an objective decision. That sen-

sory perception, at very best, is not completely reliable is clear from the documentation of supposedly "irrefutable" identifications later proved incorrect. See Borchard, *Convicting the Innocent,* p. xii (1932); Frank, *Not Guilty,* p. 31 (1957).

To negate inference or suggestion from an identification proceeding, a line-up is generally regarded as essential to provide a mode of comparison by police authorities. See *Criminal Investigation and Interrogation,* Gerber and Schroeder ed., §22.20 (1962); *Criminal Investigation,* Jackson ed. (5th ed. 1962) at pp. 41-42. The failure to provide Archie Biggers with the protection of a line-up in a rape case, considering his youth, the eight month period since the rape and other circumstances is inexcusable. There was no reason for the lack of a line-up, and every reason to provide one. As Archie Biggers was being held in police custody for an unrelated charge, this is not a case of street identification immediately after arrest, nor even a case where it was physically impossible to hold a line-up. Nor was there need to identify Archie Biggers quickly. Mrs. Beamer had been raped eight months earlier and the time necessary to arrange a line-up certainly would not have affected her identification. Indeed, the time lapse, well known to the police, should have been sufficient to mandate a line-up to police conscientiously seeking an impartial, dispassionate identification.

Presented before Mrs. Beamer without a line-up, and in the custody of five officers, Archie Biggers was required to speak the words spoken by the rapist. He said nothing else. Although this proceeding was supposedly held to test the tone and timbre of petitioner's voice, and upheld by the Supreme Court of Tennessee on this basis, *infra,* p. 5a, it would have been an extraordinary feat if the prosecutrix could have ignored the particular words spoken

and concentrated solely on the sound of the voice making them. Moreover, there was no reason to require the petitioner to speak the rapist's words. Mrs. Beamer had not indicated that the rapist spoke any word or combination of words in a distinctive or unusual manner which would aid identification. This fact was emphasized at trial when she could only describe the voice as "medium-pitched," "immature" and "soft" (Tr. 17). The use of the rapist's words were an unwarranted suggestion that the speaker was the rapist.

Identification, by whatever method, is similar to and has much the same legal effect as self-incrimination. When, as here, identification procedures cease to be objective because the person being identified is required to do something which improperly suggests that he and the offender are the same person, the due process standard of fairness, including the right against self-incrimination, is violated. The suggestion inherent in the use of the rapist's words is alone, and in combination with the total circumstances of the case, a violation of due process.

The test of Biggers' voice violated his Fifth Amendment rights because he was compelled by the police to exercise his will to speak. Requiring petitioner to make the positive act of speaking and forming particular words violated "the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev. 1961), 317, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own

mouth." *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966). This is a restatement of this Court's long-held view that "the law will not suffer a prisoner to be made the deluded instrument of his own conviction." Justice Frankfurter in *Watts* v. *Indiana*, 338 U.S. 49, 54 (1949), quoting from 2 Hawkins, Pleas of the Crown (46, §34) (8th ed. 1824).

This question is one of first instance before this Court. In *Holt* v. *United States*, 218 U.S. 245 (1910), the leading case in this Court, Justice Holmes rejected the argument that the Fifth Amendment was violated when the accused was requested to model a blouse for identification. In that case no exercise of the suspect's will was required since the blouse merely rested on his body, and might just as well been held up against his body. Justice Holmes appears to have recognized the Fifth Amendment's protection against the government overbearing an individual's will when he said, "[T]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition against the use of *physical or moral compulsion* to extort communications from him, not an exclusion of his body as evidence when it may be material." (218 U.S. at pp. 252-253) (emphasis supplied). It is obvious that a person cannot be compelled to speak against his will without "physical or moral compulsion."

More recently, this Court held in *Schmerber* v. *California*, 384 U.S. 757 (1966) that a compulsory blood test did not violate the Fifth Amendment. The court expressly refused to adopt Professor Wigmore's view that voice identification does not violate the Fifth Amendment (footnote 7, 384 U.S. at 763), and all past applications of the distinction that the Fifth Amendment bars "testimony" but not compulsion making the suspect a source of "real or physical evidence" (384 U.S. at 764). The Wigmore view that the Fifth Amendment bars only testimonial dis-

closures, 8 Wigmore, Evidence, §2263 (McNaughton rev. 1961), has been strongly challenged. Judge Wisdom, in *DeLuna* v. *United States*, 308 F.2d 140, 145 (5th Cir. 1962), said, "Professor Wigmore was consistently unfriendly to the [Fifth Amendment] privilege, especially to its recognition when there was no direct coercion by the government and when there was no formal charge to which the unanswered questions relate; his writings are an inexhaustible quarry of quotations for use against the policy of the privilege."

The true scope of the Fifth Amendment protects against governmental overbearing of a person's will. An individual has the right to be protected from coercion designed to make him do something controlled only by his will, which is the heart of a person's being and the source of his individuality. To invade this sanctuary is to destroy the well-spring of his integrity and dignity as a human being. These are values that the Fifth Amendment seeks to shield from governmental intrusion by "physical or moral compulsion."

Archie Biggers was also denied his right to assistance of counsel at the time of his identification, clearly a "critical stage" in his case. *Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964). The police were without a clue to the identity of the man who had raped Mrs. Beamer. If she could identify a man it would certainly form at least the basis for prosecution. If counsel had been present he could have done several things to insure an impartial test. He could have requested a line-up, or alternatively some other plan to assure conditions designed to avoid suggestion. If present, counsel could have questioned the prosecutrix during identification before she had placed herself in the position of making a positive identification. It is quite possible that his mere presence would have served to counterbalance that of the

police, and the inherent suggestiveness of police station identification of one in custody. Had counsel been present he might have prevented the police from requiring the petitioner to speak the words of the rapist, words which carried an inherent suggestion of guilt. Or counsel might have advised his client to remain silent.

The circumstances of this case, taken separately and in combination, establish violations of the due process clause of the Fourteenth Amendment, and through it, violations of the Fifth and Sixth Amendments. An instructive decision is *Palmer* v. *Peyton*, 359 F.2d 199 (4th Cir. 1966), where the Fourth Circuit, sitting *en banc*, held without dissent that a voice identification test without a line-up, in addition to police failure to eliminate suggestions of guilt before the test, violated due process. We believe the principle set forth by Judge Sobeloff in that case is equally applicable here:

> "In their understandable zeal to secure an identification, the police simply destroyed the possibility of an objective, impartial judgment by the prosecutrix as to whether Palmer's voice was in fact that of the man who had attacked her. Such procedure fails to meet 'those canons of decency and fairness' established as part of the fundamental law of the land" (359 F.2d at p. 202).

CONCLUSION

WHEREFORE, petitioner prays that the petition for writ of certiorari be granted and the judgment below reversed.

Respectfully submitted,

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioner

JOHN P. HOWLAND
500 East 73rd Street
New York, New York
Of Counsel

APPENDIX

APPENDIX

Opinion of the Supreme Court of Tennessee

(January 12, 1967)

DAVIDSON CRIMINAL

ARCHIE NATHANIEL BIGGERS,

Plaintiff in Error,

VS.

THE STATE OF TENNESSEE,

Defendant in Error.

Plaintiff in error, Archie Nathaniel Biggers, herein referred to as defendant, appeals from a conviction of rape for which he has been sentenced to serve twenty years (20) years in the State Vocational Training School for Boys. Defendant at the time of the crime was sixteen years old.

The victim, Mrs. Margaret Beamer, is a married woman with five children. On the night of 22 January 1965 she was at home in her living room sewing. About 9:00 p.m. she started from her living room to the bed room, which rooms are separated by a hall, and as she reached the hall defendant, with a butcher knife in his hand, grabbed her from behind pulling her to the floor. Her screams brought her daughter out of a bedroom into the hall and when the daughter saw what was happening she also began to scream. Defendant said to Mrs. Beamer, "You tell her to shut up or I'll kill you both." Mrs. Beamer ordered the daughter back into the bedroom. Defendant escorted Mrs. Beamer out the back door of the house to a spot about two blocks away where he had sexual relations with her.

Upon completion of the sexual act defendant ran away and Mrs. Beamer, returning home, notified police. About 10:15 p.m. on this night Mrs. Beamer was medically examined which revealed she had had sexual intercourse within three (3) hours prior to that time.

During the early hours of 17 August 1965 defendant was arrested for an incident occurring on this night of his arrest and immediately taken to Juvenile Aid. Defendant's mother came to Juvenile Aid and in her presence he was fully advised of his constitutional rights. Later on in the morning defendant was released to the Police Department and Mrs. Beamer, at Police Headquarters, identified defendant as the person who raped her on 22 January 1965.

Defendant as a witness in his own behalf denied any knowledge of the crime. Several witnesses testified to his good character.

The assignments of error are as follows:

1. The evidence preponderates against the verdict of the jury and in favor of the innocence of the accused.
2. The defendant was prejudiced when a witness for the State mentioned other offenses allegedly committed by the defendant for which he was not on trial and for which he had not previously been convicted.
3. The defendant was prejudiced when the Attorney General went outside the evidence in the case while making his final argument to the jury.
4. The defendant was required to give evidence against himself without having been advised of his constitutional rights.
5. The defendant was prejudiced by the action of the Trial Court in refusing to require the State to furnish him a transcript of the trial proceedings.

The first assignment of error is predicated upon the ground the identity of defendant by the victim was so vague, uncertain and unsatisfactory and given under such circumstances as not to have any substantial probative value. This identification was made based upon the defendant's size, voice, skin texture and hair. On identification the trial judge asked the victim, "All-right. Is there any doubt in your mind." To which the victim replied, "No, there's no doubt." Identification is a question of fact for the jury. *Stubbs* v. *State*, 216 Tenn. ——, 393 SW2d 150 (1965). The first assignment of error is overruled.

Under the second assignment of error it is alleged Thomas E. Cathey a member of the Metropolitan Police Department, as a witness for the State, mentioned other offenses allegedly committed by defendant. In defendant's brief these references to other crimes are described as being "by inference." We have carefully examined the pages of the transcript cited and find no reference to other crimes. The assignment of error is overruled.

Objection is made, under the third assignment of error, to the following argument by the Assistant District Attorney General:

> "In many parts of our United States, Gentlemen of the Jury, a case of this nature would never go to trial, and I am sorry to say, its all south of the State of Tennessee, and that is because of this fine woman, Mrs. Beamer's environment, economic circumstances, and situation, she is not considered in those states to have any more rights than a dog and her reproductive organs—".

The argument above was not completed due to objection by defendant which was sustained by the court. The Assistant District Attorney General did not pursue this line of argument further. Both the defendant and the victim

were members of the Negro race a fact, of course, known to the jury. It is insisted, under these circumstances, this argument was an appeal to racial prejudice. We agree this line of argument was improper, but in light of the prompt action of the trial judge we think such was harmless error. The third assignment of error is overruled.

Mrs. Beamer and defendant, for the purpose of possible identification, were brought together at Police Headquarters. Mrs. Beamer requested police have defendant repeat in her presence some of the words her assailant had used at the time of the rape. The words requested were, "Stop or I'll kill you." Defendant, upon instructions of police, repeated these words and Mrs. Beamer bases her identification of defendant as her assailant partly upon his voice. Under the fourth assignment of error it is alleged requiring defendant to speak these words for the purpose of identification violated his constitutional right against self-incrimination.

While the exact problem presented here has not been before this Court, yet we think it is controlled by the logic and reason used by the court in the case of *Barrett* v. *State,* 190 Tenn. 366, 229 SW2d 516 (1950). The *Barrett* case involved a defendant required to wear a hat at the time he was being identified. This court, rejecting the argument such was a violation of defendant's privilege against self-incrimination, quoted from *Wigmore on Evidence,* 3 Ed., Section 2265, p. 375 as follows:

> "Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, demand made upon him is not a testimonial one." 190 Tenn. 372.

A thorough analysis of the problem presented can be found in 8 *Wigmore on Evidence,* sec. 2265, at pp. 386, 396 (McNaughton, rev. 1961). In analyzing this constitutional privilege Dean Wigmore lists eleven (11) principal categories which he specifically states are not covered. Category No. 7 is: "Requiring a suspect to speak for identification." A number of cases are cited for the proposition a defendant's rights are not violated when he is forced to speak certain words solely for the purpose of identification. See above citation in Wigmore.

In the instant case defendant was told what words to say and in repeating them he did not give any factual information tending to connect him with the crime; nor could any reliance be placed on these words which would indicate defendant was conscious of, or had knowledge of, any facts of the crime. The only thing he gave was the sound of his voice to be used, along with other things, solely for the purpose of identification. Under these circumstances we do not think defendant's constitutional right against self-incrimination was violated. The fourth assignment of error is overruled.

Under T.C.A. 40-2037 et seq. the State is required to furnish to an indigent defendant a transcript upon request. The trial judge determines if the defendant is indigent and in this case determined defendant was not indigent. We find no error in this determination by the trial judge. The fifth assignment of error is overruled.

Judgment affirmed.

Denial of Rehearing by Supreme Court of Tennessee

(March 1, 1967)

DAVIDSON CRIMINAL

ARCHIE NATHANIEL BIGGERS,

Plaintiff in Error,

vs.

THE STATE OF TENNESSEE,

Defendant in Error.

PETITION TO REHEAR

Plaintiff in error has filed a petition to rehear as result of our original opinion filed 12 January 1967. Rule 32 of this court, inter alia, states:

> A rehearing will be refused where no new argument is made, and no new authority adduced, and no material fact is pointed out as overlooked.

Under this rule this petition to rehear is denied.

.....

Ross W. Dyer, J.

Burnett, CJ; Chattin & Creson, JJ; Harbison, SJ;

Concur

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

DOCKET NO. 1[redacted]237

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for Writ of Certiorari.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

ROBERT F. HEDGEPATH,
Assistant Attorney General,
State of Tennessee.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

DOCKET NO. 1562 Misc.

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for Writ of Certiorari.

MAY IT PLEASE THE COURT:

The respondent, State of Tennessee, for its statement in opposition to the petition for writ of certiorari, respectfully shows to the Court:

OPINIONS BELOW.

The opinion of the Supreme Court of Tennessee upon petitioner's appeal from his conviction in the Criminal Court of Davidson County, Tennessee, is to be found

in the Appendix to respondent's brief. The opinion of the Supreme Court of Tennessee upon petitioner's petition to rehear is also printed in the Appendix to the respondent's brief.

JURISDICTION.

Jurisdiction is sought by the petitioner under 28 U. S. C., Section 1257 (3).

QUESTIONS PRESENTED.

I.

Whether or not the Fifth Amendment to the United States Constitution relating to self-incrimination prohibits the use of Voice Identification in a state's identification procedure.

II.

Whether or not the Sixth Amendment to the United States Constitution relating to assistance of counsel requires counsel to be present during the **identification procedure,** (1) when the investigation is but a general inquiry into an unsolved crime, and (2) when held prior to the commencement of criminal proceedings.

STATEMENT OF THE CASE.

The record shows that Mrs. Margaret Work Beamer was raped on the night of January 22, 1965. She was assaulted in her home and forced to walk some distance to a wooded area where the rape occurred (B/E, p. 7). Following this incident, she telephoned the police and was taken to a local hospital and examined by Dr. Core, the Medical Examiner for Davidson County, Tennessee. Dr. Core testified that he examined Mrs. Beamer at approximately 10:15 p. m. on the night of January 22, 1965, and that as a result of the examination concluded that she had had intercourse within three (3) hours prior to that time (B/E, p. 88).

The evidence offered on behalf of the defendant consisted primarily of character witnesses with the exception that the defendant testified in his own behalf and said that he was not guilty of raping Mrs. Beamer and, further, that he had never seen her prior to the day on which she identified him as her assailant. The defense in the trial never questioned the fact of rape but took the position that the defendant was not the guilty party. Because of this tactic, it became significant that the State establish that the victim had identified the defendant as the rapist.

The record shows that Mrs. Beamer had made occasional trips to the police station to identify suspects in the interim period between January 22, 1965, and August 17, 1965 (B/E, p. 28). The record also shows that Mrs. Beamer identified the defendant prior to the front page article which published a picture of the petitioner. She identified him on the afternoon of August 17, 1965, and stated that it was the next morning when the picture of the petitioner was published in the local papers (B/E, p. 27). She identified the petitioner as the rapist (B/E,

p. 14a), and based that identification on his size, voice, skin texture, and hair (B/E, p. 17 ff). Mrs. Beamer, a Negro, stated during the trial that there was absolutely no doubt in her mind but that the petitioner, a Negro, was the person who had raped her (B/E, p. 19). She stated that she was able to look "up in his face" on the night she was raped (B/E, p. 42). She said, in response to a question put to her on cross-examination concerning whether or not she could see the rapist, "Yes, I could see him, when I looked up in his face."

Mr. Thomas E. Cathey, an officer with the Homicide Division of the Nashville-Metropolitan Police Department, testified that the petitioner was arrested at about 1:30 a. m. on August 17, 1965. He was taken immediately to the Juvenile Court, his mother came and in her presence the defendant was advised of his constitutional rights. He was then questioned concerning the incident which had occurred earlier that night which was the incident for which he was arrested (B/E, p. 71). He was accused of having attempted to rape a woman in the Nashville area.

While in the custody of the police, the petitioner was identified by Mrs. Beamer. At that identification, he was asked to repeat the words used by the rapist on January 22, 1965. The record shows that the police called Mrs. Beamer to headquarters as they had done in the past, although the petitioner was not arrested for raping her nor had any investigation focused upon him.

ARGUMENT.

I.

The overwhelming majority of jurisdictions permit testimony concerning Voice Identification to be admitted against the defendant. When an accused is required to speak certain words solely for the purpose of identification of his voice, there is no violation of the Fifth Amendment privilege. This general statement is supported both by the authorities and by case law. 8 **Wigmore on Evidence**, § 2265, pp. 386, 396 (McNaughton, Rev. 1961); **Lenoir v. State**, 197 Md. 495, 80 Atl. 2d 3 (1951); **Johnson v. Commonwealth**, 115 Penn. 369, 9 Atl. 78 (1886); **Johnson v. State** (Texas), 318 S. W. 2d 76 (1958).

A number of circumstances involving the identification of an accused have been held not to violate the Fifth Amendment privilege against self-incrimination. In the case of **Barrett v. State**, 190 Tenn. 366, 229 S. W. 2d 516 (1950), the defendant was required to wear a hat during the identification procedure. In the case of **Ross v. State**, 204 Ind. 281, 182 N. E. 865 (1932), the accused was required to grow a beard and place a handkerchief across his face. In **Bryant v. United States**, 244 F. 2d 411 (5th Cir. 1957), the accused was required to furnish the police with a handwriting specimen. In the case of **Holt v. United States**, 218 U. S. 245, 54 L. Ed. 1021, 31 Sup. Ct. 2 (1910), the accused was required to wear a shirt or blouse.

The petitioner has cited two (2) cases in which this Court has granted certiorari. Although there appears to be a conflict in the conclusions reached by the two circuits, neither court concluded that it would be a violation of the Fifth Amendment to allow a victim to identify

an accused. See: **United States ex rel. Stovall v. Denno**, 355 F. 2d 731 (2nd Cir. 1966), cert. granted, 34 U. S. L. Week 3429 (June 20, 1966); **Wade v. United States**, 358 F. 2d 557 (5th Cir. 1966), cert. granted, 35 U. S. L. Week 3124 (Oct. 10, 1966).

In the case of **Rochin v. California**, 342 U. S. 165, 96 L. Ed. 183, 72 Sup. Ct. 205 (1952), the accused swallowed two (2) morphine tablets at the time of his arrest. He was taken to a physician who pumped his stomach and the pills were seized and analyzed. Mr. Justice Douglas, in speaking with the majority but in a concurring opinion, said, regarding the privilege against self-incrimination, that: ". . . I think that **words taken from his lips**, capsules taken from his stomach", etc., are inadmissible if without the accused's consent (Emphasis supplied). This rationale is in keeping with this Court's statement in **Holt v. United States**, *supra*. It is the forced **communication** of some fact from the accused to the authorities which is prohibited by the Fifth Amendment. The mere muscularization of the vocal cords for the purpose of identification is different from eliciting from the accused his awareness of facts concerning the crime. An often used quote taken from **Wigmore on Evidence**, *supra*, § 2265, is as follows:

> "Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, demand made upon him is not a testimonial one."

(And, therefore, not protected by the privilege.)

Although this Court has not completely accepted the theory of Professor Wigmore that the privilege protected by the Fifth Amendment is limited to testimonial disclosures, the case of **Schmerber v. California**, 384 U. S.

757, 16 L. Ed. 2d 908, 86 Sup. Ct. 1826 (1966), does represent the view that the Fifth Amendment privilege does not prohibit the taking of a blood test over the objection of the defendant. There, this Court said:

> "We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, in that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."

The same reasoning is applicable in the case of Voice Indentification. This Court acknowledged in the **Schmerber** case that both federal and state courts have usually held that the Fifth Amendment privilege "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture."

Under the facts in the case at bar, the requirement that the petitioner speak for the purpose of identification did not have the effect of eliciting from him any factual information regarding the crime which he possessed. This is the test which has traditionally been applied. The petitioner was not asked for any factual information whatsoever. He was not asked to recite of his own knowledge what was said at the time Mrs. Beamer was raped. He was merely requested to repeat the words which the rapist used on the night of the crime.

As was said in the case of **United States ex rel. Stovall v. Denno**, *supra*, there is no prejudice in these situations

where the victim later positively identifies the accused in the trial. As has heretofore been stated, Mrs. Beamer made a positive identification of the petitioner at the trial (B/E, p. 19). As was further stated in the **Stovall** case, the method of identification of the petitioner should go not to the admissibility or sufficiency of the identification, but to the weight to be given the testimony concerning it. The Court said in the case of **Wade v. United States**, *supra*, that an identification procedure properly conducted does not run afoul of the self-incrimination provision of the Fifth Amendment.

II.

Petitioner urges this Court to grant certiorari in this case because he contends that the identical question raised here is presented in the two (2) cases mentioned in which this Court has previously granted certiorari. Respondent respectfully insists that the questions are not the same.

It is clear from an analysis of **United States ex rel. Stovall v. Denno**, *supra*, and **Wade v. United States**, *supra*, that the question in those cases is not whether it is a violation of due process for a victim to identify an accused during an identification procedure at police headquarters; but whether it is incumbent upon the State to provide counsel to the accused at the identification procedure following the commencement of criminal proceedings against him. The case at bar is unlike those cases inasmuch as at the time of the identification of the accused by Mrs. Beamer, no criminal proceedings had commenced insofar as this matter is concerned. The plain truth is that the petitioner had been arrested on a separate charge and as a matter of general inquiry Mrs. Beamer was called to see whether or not she could identify him.

This is not a situation in which an investigation had focused upon an accused held in police headquarters and

is, therefore, not within the realm of **Escobedo v. Illinois**, 378 U. S. 478, 12 L. Ed. 2d 977, 84 Sup. Ct. 1758 (1964), or **Miranda v. Arizona**, 348 U. S. 436, 16 L. Ed. 2d 694, 86 Sup. Ct. 1602 (1966)

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

ROBERT F. HEDGEPATH,
Assistant Attorney General,
State of Tennessee.

Certificate of Service.

I, George F. McCanless, Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on the 25th day of April, 1967, I served a copy of the within brief in opposition to the petition for writ of certiorari on Archie Nathaniel Biggers, petitioner, by mailing said copy in a duly addressed envelope, postage duly paid, to counsel of record, namely, Michael Meltsner, Esq., Attorney at Law, 10 Columbus Circle, New York, New York.

George F. McCanless,
Attorney General,
State of Tennessee.

Archie Nathaniel Biggers,
Plaintiff in Error.
vs.
The State of Tennessee,
Defendant in Error.
} Davidson Criminal.

In the Supreme Court of Tennessee.

Appeal in Error From the Criminal Court of Davidson County.

Honorable Raymond H. Leathers, Judge.

Opinion Filed.

For Archie Nathaniel Biggers,
Honorable Avon Williams,
Of Counsel,
Looby and Williams of Nashville, Tennessee.

For the State of Tennessee,
Assistant District Attorney General John Hollins,
Assistant State Attorney General Robert Hedgepath.

Judgement Affirmed.

Justice Ross W. Dyer.

Arichie Nathaniel Biggers,
Plaintiff in Error.
vs.
The State of Tennessee,
Defendant in Error.
} Davidson Criminal.

Opinion.

Plaintiff in error, Archie Nathaniel Biggers, herein referred to as defendant, appeals from a conviction of rape for which he has been sentenced to serve twenty years (20) years in the State Vocational Training School for Boys. Defendant at the time of the crime was sixteen years old.

The victim, Mrs. Margaret Beamer, is a married woman with five children. On the night of 22 January 1965 she was at home in her living room sewing. About 9:00 p. m. she started from her living room to the bedroom, which rooms are separated by a hall, and as she reached the hall defendant, with a butcher knife in his hand, grabbed her from behind pulling her to the floor. Her screams brought her daughter out of a bedroom into the hall and when the daughter saw what was happening she also began to scream. Defendant said to Mrs. Beamer, "You tell her to shut up or I'll kill you both." Mrs. Beamer ordered the daughter back into the bedroom. Defendant escorted Mrs. Beamer out the back door of the house to a spot about two blocks away where he had sexual relations with her. Upon completion of the sexual act defendant ran away and Mrs. Beamer, returning home, notified police. About 10:15 p. m. on this night Mrs. Beamer was medically exmained which revealed she had had sexual intercourse within three (3) hours prior to that time.

During the early hours of 17 August 1965 defendant was arrested for an incident occurring on this night of his arrest and immediately taken to Juvenile Aid. Defendant's mother came to Juveniel Aid and in her presence was fully advised of his constitutional rights. Later on in the morning defendant was released to the Police Department and Mrs. Beamer, at Police Headquarters identified defendant as the person who raped her on 22 January 1965.

Defendant as a witness in his own behalf denied any knowledge of the crime. Several witnesses testified to his good character.

The assignments of error are as follows:

1. The evidence preponderates against the verdict of the jury and in favor of the innocence of the accused.

2. The defendant was prejudiced when a witness for the State mentioned other offenses allegedly committed by the defendant for which he was not on trial and for which he had not previously been convicted.

3. The defendant was prejudiced when the Attorney General went outside the evidence in the case while making his final argument to the jury.

4. The defendant was required to give evidence against himself without having been advised of his constitutional rights.

5. The defendant was prejudiced by the action of the Trial Court in refusing to require the State to furnish him a transcript of the trial proceedings.

The first assignment of error is predicated upon the ground the identity of defendant by the victim was so vague, uncertain and unsatisfactory and given under such circumstances as not to have any substantial probative

value. This identification was made based upon the defendant's size, voice, skin texture and hair. On identification the tiral judge asked the victim, "All right. Is there any doubt in your mind." To which the victim repiled, "No, there's no doubt." Identification is a question of fact for the jury. **Stubbs v. State**, 216 Tenn. .. 393 S. W. 2d 150 (1965). The first assignment of error is overruled.

Under the second assignment of error it is alleged Thomas E. Cathey a member of the Metropolitan Police Department, as a witness for the State, mentioned other offenses allegedly committed by defendant. In defendant's brief these references to other crimes are described as being "by inference." We have carefully examined the pages of the transcript cited and find no reference to other crimes. The assignment of error is overruled.

Objection is made, under the third assignment of error, to the following argument by the Assistant District Attorney General:

> In many parts of our United States, Gentlemen of the Jury, a case of this nature would never go to trial, and I am sorry to say, its all south of the State of Tennessee, and that is because of this fine woman, Mrs. Beamer's environment, economic circumstances, and situation, she is not considered in those states to have any more rights than a dog and her reproductive organs—".

The argument above was not completed due to objection by defendant which was sustained by the court. The Assistant District Attorney General did not pursue this line of argument further. Both the defendant and the victim were members of the Negro race, a fact, of course, known to the jury. It is insisted, under these circumstances, this argument was an appeal to racial prejudice.

We agree this line of argument was improper, but in light of the prompt action of the trial judge we think such was harmless error. The third assignment of error is overruled.

Mrs. Beamer and defendant, for the purpose of possible identification, were brought together at Police Headquarters. Mrs. Beamer requested police have defendant repeat in her presence some of the words her assailant had used at the time of the rape. The words requested were, "Stop or I'll kill you." Defendant, upon instruction of police, repeated these words and Mrs. Beamer bases her identification of defendant as her assailant partly upon his voice. Under the fourth assignment of error it is alleged requiring defendant to speak these words for the purpose of identification violated his constitutional right against self-incrimination.

While the exact problem presented here has not been before this Court, yet we think it is controlled by the logic and reason used by the court in the case of **Barrett v. State**, 190 Tenn. 368, 229 S. W. 2d 516 (1950). The **Barrett** case involved a defendant required to wear a hat at the time he was being identified. This court, rejecting the argument such was a violation of defendant's privilege against self-incrimination, quoted from **Wigmore on Evidence**, 3 Ed., Section 2265, p. 375 as follows:

> Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, demand made upon him is not a testimonial one." 190 Tenn. 372.

A thorough analysis of the problem presented can be found in 8 **Wigmore on Evidence**, sec. 2265, at pp. 386, 396 (McNaughton, rev. 1961). In analyzing this consti-

tutional privilege Dean Wigmore lists eleven (11) principal categories which he specifically states are not covered. Category No. 7 is: "Requiring a suspect to speak for identification." A number of cases are cited for the proposition a defendant's rights are not violated when he is forced to speak certain words solely for the purpose of identification. See above citation in Wigmore.

In the instant case defendant was told what words to say and in repeating them he did not give any factual information tending to connect him with the crime; nor could any reliance be placed on these words which would indicate defendant was conscious of, or had knowledge of, any facts of the crime. The only thing he gave was the sound of his voice to be used, along with other things, solely for the purpose of identification. Under these circumstances we do not think defendant's constitutional right against self-incrimination was violated. The fourth assignment of error is overruled.

Under T. C. A. 40-2037 et seq. the State is required to furnish to an indigent defendant a transcript upon request. The trial judge determines if the defendant is indigent and in this case determined defendant was not indigent. We find no error in this determination by the trial judge. The fifth assignment of error is overruled.

Judgment affirmed.

Ross W. Dyer, J.

Burnett, CJ; Chattin & Creson, JJ;
Harbison, SJ;
Concur

Archie Nathaniel Biggers,
Plaintiff in Error,
vs.
The State of Tennessee,
Defendant in Error.

Davidson
Criminal.

Petition to Rehear.

Plaintiff in error has filed a petition to rehear as result of our original opinion filed 12 January 1967. Rule 32 of this court, inter alia, state:

> A rehearing will be refused where no new argument is made, and no new authority adduced, and no material fact is pointed out as overlooked.

Under this rule this petition to rehear is denied.

Ross W. Dyer, J.

Burnett, CJ; Chattin & Creson, JJ;
Harbison, SJ;
Concur

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IN THE

Supreme Court of the United States

October Term, 1967

No. 237

ARCHIE NATHANIEL BIGGERS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR PETITIONER

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioner

JOHN P. HOWLAND
11 Hillcrest Road
Port Washington, New York

Of Counsel

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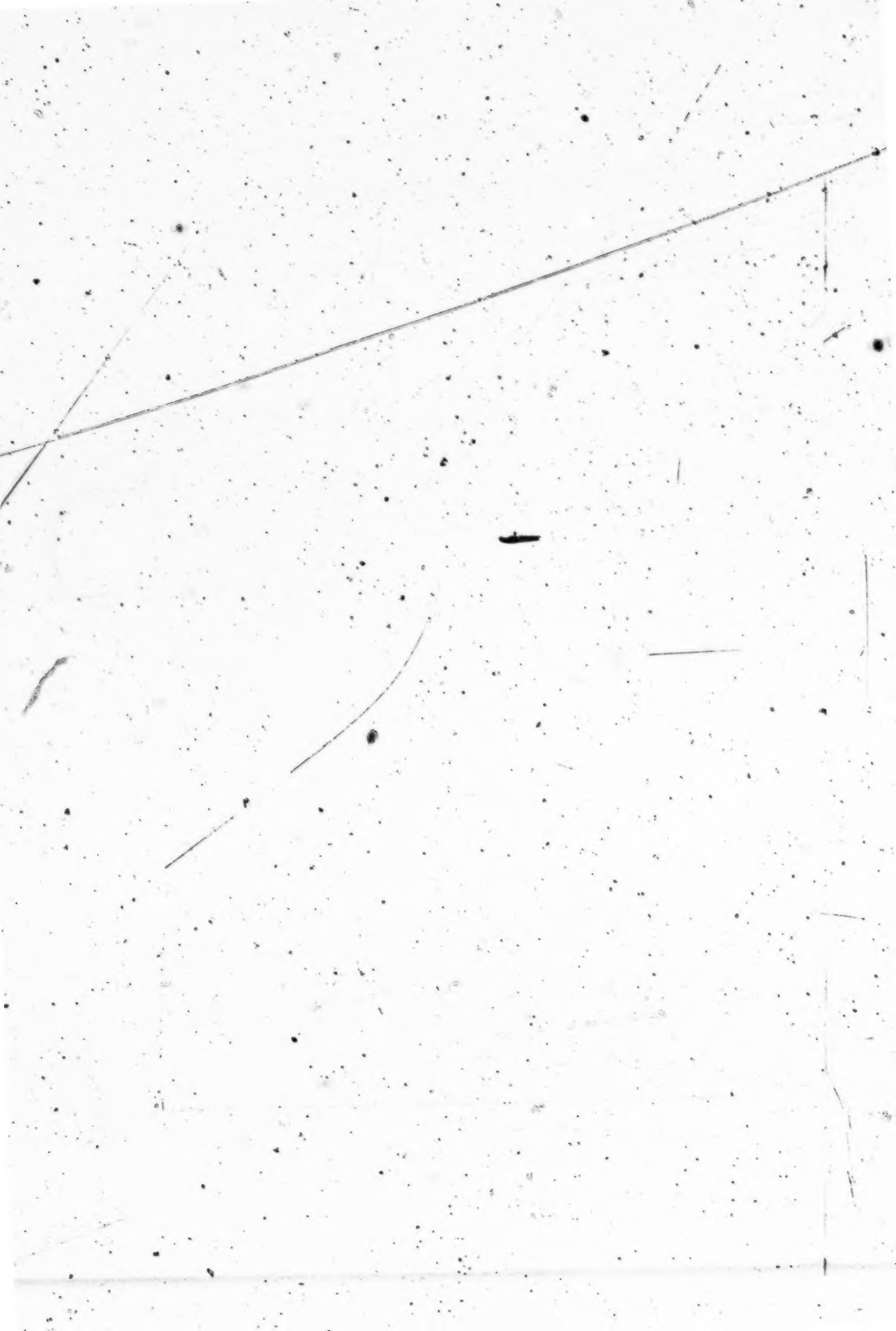

IN THE

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Tennessee (R. 202-06) is reported at —— Tenn. ——, 411 S.W.2d 696 (1967). The judgment of the Supreme Court of Tennessee (R. 207) and its order denying rehearing (R. 219) are unreported.

Jurisdiction

The judgment of the Supreme Court of Tennessee was entered on January 12, 1967 (R. 207). Rehearing was denied March 1, 1967 (R. 219). Petition for writ of certiorari was filed April 1, 1967 and was granted June 12, 1967. The jurisdiction of this Court rests on 28 U.S.C. §1257(3), petitioner having asserted below and here the deprivation of rights secured by the Constitution of the United States.

Constitutional Provisions Involved

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Questions Presented

To permit identification by the prosecutrix, the police compelled petitioner, a 16 year-old Negro boy, to repeat words spoken by her assailant during the offense seven months earlier. There was no lineup; petitioner was alone in their custody at the police station.

1. Was petitioner denied due process of law when convicted of rape solely on the basis of testimony of this pretrial identification.

2. Whether the state violated petitioner's privilege against self-incrimination by compelling him to speak the words used by the criminal at a pre-trial identification and introducing the compelled statement as direct evidence against him at trial.

Statement

On the night of January 22, 1965, Mrs. Margaret Beamer, a 39-year old Negro woman, was raped by an intruder. Brandishing a large butcher knife the assailant entered her house through a rear door, grabbed her from behind in an unlit hallway and threw her to the floor (R. 9, 10). Mrs. Beamer's attention was drawn to the attacker's knife and she was unable to describe the rapist other than to state that he was large, had a youthful voice, soft skin, and "sort of bushy" hair (R. 14, 17, 18, 50). The record does not show whether she reported these characteristics

to the police immediately following the crime; only that she testified to identifying petitioner on the basis of them at a police station seven months later (R. 14, 17).

Hearing her mother shout, Mrs. Beamer's 13-year old daughter ran into the hallway (R. 83). She approached within a foot of the intruder, whose face was turned toward her, before being ordered back into her bedroom (R. 90, 91). The intruder then took Mrs. Beamer out of the house through an unlit kitchen to a nearby patch of woods where he raped her. The events surrounding the crime lasted some 10 to 30 minutes (R. 26, 85). During the following seven months, the police requested Mrs. Beamer to look at police photographs on several occasions and although she identified the picture of one man as "having features" like the rapist, the case lay dormant (R. 15, 25, 38, 39, 50, 51, 64, 65, 74).

On August 17, 1965, Archie Nathaniel Biggers, a 16-year old Negro, was arrested at 1:30 A.M. and allegedly identified by a white woman as the person who had attempted to rape her earlier that night (R. 196). An August 17th edition of the Nashville *Tennessean*, a morning newspaper, carried a front page story of the assault and arrest (R. 196). Biggers, although not named, was described as a "burly-16-year old Negro." According to the article, he had been identified by the victim; the police were questioning him in connection with similar incidents and would confront him with victims of these earlier incidents. An August 18th edition of the paper showed a picture of Biggers entering jail and stated that he had confessed to attacking the white woman, Mrs. Carrie Silverman, that Mrs. Beamer had identified him as her attacker, and that two other attempted rape victims could not identify him. Biggers' mother reportedly had retained an attorney the day he was arrested (R. 197, 46, 47). At trial, the State

initiated reference to newspapers accounts of Biggers' arrest in order to establish that Mrs. Beamer had identified Biggers before his photograph appeared on August 18th (R. 17). The record does not show whether Mrs. Beamer had seen the first story in the *Tennessean* published the morning of the 17th (R. 17, 24).

On the day of Biggers' arrest the police went to Mrs. Beamer's home and brought her to the police station, as one officer put it, to "look at a suspect" in one of the rooms in the detective division (R. 24, 25, 39, 65, 77, 78). The police brought Biggers into the adjoining hall and then to the doorway of the room in which the prosecutrix was seated (R. 40, 66, 80).[1] Mrs. Beamer saw Biggers in the doorway in the presence of "quite a few"—at least five—policemen (R. 39, 48, 65, 73, 79). Neither his parents nor attorney had been notified of the identification. Mrs. Beamer asked the police to have Biggers speak and the police instructed him to repeat words spoken by the rapist at the time of the offense: "Shut-up, or I'll kill you." (R. 18, 66, 68, 69, 78, 79). Only after she heard him speak the rapist's words did Mrs. Beamer identify Archie Biggers as the man who had raped her (R. 17).[2]

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[1] After his arrest, early in the morning of August 17, 1965, Biggers was lodged in a juvenile detention facility. Later he was transferred to the custody of the police department in order to be confronted by Mrs. Beamer. At trial, a police officer was asked by what authority Biggers was removed from juvenile detention. He stated "Well, we had papers that he was ruled incorrigible which they signed out there, so that they could—" (R. 52). This statement should not be read to imply that the decision to release Biggers to the police on August 17th was reached after a judicial proceeding in the junvenile court, for Biggers was not remanded to the Sheriff of Davidson County, Tennessee, to be dealt with as an adult, until August 24, 1965.

[2] One officer present testified that Mrs. Beamer identified Biggers before he spoke (R. 80), but Mrs. Beamer herself stated reliance on his voice for identification (R. 17). Another officer and petitioner also testified that she requested him to speak prior to naming him as the rapist (R. 66, 107, 108).

Petitioner was indicted for the rape of Mrs. Beamer on October 1, 1965 and tried two months later (R. 1, 6). At trial, the only evidence connecting him with the rape was Mrs. Beamer's stationhouse identification. Her thirteen-year old daughter testified to what she saw but was unable to identify Biggers as the rapist (R. 83). On direct examination, Mrs. Beamer testified that she had identified Biggers at the police station on the basis of his general size, voice, and skin and hair texture but she did not identify Biggers in the courtroom. Biggers' voice was described as that of an "immature youth," who talked "soft" in a "medium pitched" voice (R. 17-19).

On direct examination four of the five police officers who were present at the pre-trial identification described Mrs. Beamer's identification of Biggers at the police station (R. 39, 48, 66, 75). At one point petitioner's counsel objected that this testimony served to bolster the impact of the identification on the jury but the objection was overruled (R. 75, 76).[3]

Petitioner testified in his own behalf and denied that he committed the act charged. He also told the jury that the police directed him to speak the words of the rapist and that Mrs. Beamer did not identify him until after he had spoken (R. 107, 108). Biggers' mother, stepfather, and seven friends and neighbors testified that petitioner was an obedient and truthful young man of good reputation who had never before been in "trouble" (R. 116-74).

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[3] "Mr. Williams: —that it is immaterial,—that I objected to on the other—it is immaterial and incompetent. She has already testified with regard to how identification—and that identification has to be weighed by the Jury on the basis of what she has testified, not on the basis of what—of this happened—a test to try to build it up by having about three or four police officers come in here and say, Why, yeah, I saw her identify him. That is not evidentiary, your Honor." (R. 75).

In his summation, the prosecuting attorney characterized the issue in the case as one of identification (R. 177, 181). He repeated Mrs. Beamer's identification testimony and related a story concerning a case that he had tried, the point of which was that "violence and terror" result in accurate identification.[4] On the basis of Mrs. Beamer's identification, the only evidence linking petitioner to the rape, the jury found Archie Biggers guilty and he was sentenced to the State Vocational Training School for Boys for twenty years (R. 4, 193-195).[5] On appeal, the Supreme Court of Tennessee rejected petitioner's constitutional claim that his identification was "so fundamentally unfair and oppressive as to invalidate all evidence flowing therefrom" (R. 200, 204-06).

SUMMARY OF ARGUMENT

I.

The police directed the attention of the witness to petitioner by exhibiting him for identification alone while in their custody at a stationhouse. As recognized by this Court in *Stovall* v. *Denno*, 388 U.S. 293 (1967) presenting an accused for identification without a lineup is grossly suggestive, constituting a violation of due process absent imperative reasons for failing to hold a lineup not present

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[4] "After that case was concluded one of the Jurors came to me, he said, you know, Mr. Hollins, when I was in the Army, World War I—World War II, I was in the trenches and I looked up and saw a big German soldier, with a bayonet, standing over me. Somebody shot him and I was saved. But he says you know if I saw that soldier walking down the street today I would recognize him. And there's something about the violence and terror of the situation that fixes these matters indelibly in a person's mind. And if you don't think that is true, then you acquit this defendant." (R. 177).

[5] Although Biggers was originally sentenced to an institution for youthful offenders, he has been placed in the Tennessee State prison, a facility for adults.

in this case. In addition, to use of such a "showup", this case presents circumstances which unnecessarily prejudiced a fair trial. The witness was open to suggestive influences before the identification, for opportunity to observe the assailant was insufficient and the crime had occurred seven months earlier. She relied particularly on her memory of a voice. The police labelled petitioner a "suspect" before showing him, made him speak the identical words used by the rapist, and presented him for identification surrounded by policemen. His family and counsel were not present although petitioner was only 16 years old. At trial, the pre-trial identification was the only evidence of guilt. In an attempt to bolster the identification before the jury, four policemen reiterated its circumstances. The victim's daughter, however, could not identify petitioner and the victim did not attempt to identify him in the courtroom. By presenting petitioner in such a manner as to encourage positive identification and by sole reliance on the tainted pre-trial identification, the state precluded a meaningful confrontation at trial.

II.

Petitioner was instructed by the police to speak the words of the rapist—"Shut up, or I'll kill you"—in order to enable the victim to identify him and evidence of what he said was introduced by the state against him at trial. Use of such evidence by the state constitutes compulsory self-accusation for it bolsters the identification and converts the speech into a response which is essentially testimonial. As the Court recognized in *United States* v. *Wade*, 388 U.S. 218, 223 (1967), it is one thing to compel speech for pre-trial identification purposes but quite another to use it to support conviction and punishment.

When an accused is compelled to speak the risk of incrimination is always high, but if the speech is admissible

at trial the state has an incentive to induce incrimination at an identification proceeding. When compelled speech is presented to a jury, incrimination may be supplied by the nature of the speech itself or by the person who repeats the testimony. The privilege against self-incrimination has been construed by this Court to protect against governmental overbearing of a person's will. As speech requires volitional cooperation, to permit government to compel it is to impair the sense of dignity and integrity which is at the heart of the Fifth Amendment.

ARGUMENT

I.

The Circumstances of Petitioner's Pre-Trial Identification and Its Use as Evidence at Trial Deny Him Due Process of Law as Guaranteed by the Fourteenth Amendment.

The decisions of this Court in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) holding pre-trial identification in absence of counsel violates the Sixth Amendment, would require reversal in this case but for the decision in *Stovall* v. *Denno*, 388 U.S. 293 (1967), barring their retroactive effect.[6] Like Wade and Gilbert, Biggers was denied the right to the assistance of his retained counsel by the police holding a pre-trial identification proceeding in his attorney's absence.[7] The

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[6] *Stovall* v. *Denno* held that "Wade and Gilbert affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after this date [June 12, 1967]" 388 U.S. 293, 296. The Biggers identification took place on August 17, 1965 (R. 19).

[7] Identification in this case was made before indictment, while the identifications in *Wade* and *Gilbert* were post-indictment. This difference is

Court remanded *Wade* to determine whether a subsequent in-court identification should be excluded as the tainted product of the lineup identification, while *Gilbert* excluded in-court testimony of the pre-trial identification *per se*. As petitioner was convicted on the testimony of the prosecutrix's pre-trial identification at a showup (she did not attempt to identify him at trial) where petitioner was unrepresented by counsel, Biggers would be entitled under *Gilbert* to exclusion of the identification.[8]

A. *The Failure of the Police to Hold a Lineup Violates Due Process.*

The question, therefore, is that left open in *Stovall* v. *Denno*, 388 U.S. 293, 301, 302 (1967), whether the pre-trial confrontation between petitioner and the victim "was so unnecessarily suggestive and conducive to irreparable mistaken identification that [petitioner] was denied due process of law. This is a recognized ground of attack upon a conviction independent of any right to counsel claim. *Palmer* v. *Peyton*, 359 F.2d 199 (C.A. 4th Cir. 1966)."

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not a ground to distinguish the cases. This Court has long held that determination of the "critical stage," when the right to counsel attaches, turns upon whether the accused's *right to a fair trial* may be sacrificed or lost before trial due to the absence of counsel. *United States* v. *Wade*, 388 U.S. 218, 224-227 (1967). No particular stage of the prosecution is the "critical stage." See, *e.g.*, *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (arraignment); *White* v. *Maryland*, 373 U.S. 59 (1963) (preliminary hearing); *Massiah* v. *United States*, 377 U.S. 201 (1964) (post indictment, accused on bail); *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (pre-indictment); see *Miranda* v. *Arizona*, 384 U.S. 436, 477 (1966). The "grave potential for prejudice, intentional or not, in the pre-trial [showup]" which is manifested throughout this case leaves no doubt that the pre-trial identification of Archie Biggers "was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *United States* v. *Wade*, *supra*, 388 U.S. at p. 227.

[8] An identification of a single suspect, as distinguished from a lineup, will be denominated a "showup", following the definition in Wall, Eyewitness Identification in Criminal Cases, 27.

The accused in *Stovall* was identified without a lineup, a procedure of acknowledged suggestiveness: "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned" (388 U.S. at p. 302). Nevertheless, due process was not violated in *Stovall* solely because of exigent circumstances. The victim was in danger of death, and if an identification was to be made at all "an immediate hospital confrontation was imperative" (*Ibid.*).

The extraordinary need for an immediate identification without a lineup present in *Stovall* is completely absent here. On the contrary, at the time of the identification, Biggers was in police custody on an unrelated charge and continuously available for identification. Similarly, Mrs. Beamer was, and had been for seven months, continuously available to identify possible suspects. Her health was unimpaired, and no other factors made an immediate identification by her without a lineup "imperative." Held without exigent compelling circumstances, Biggers' showup identification violated due process under the reasoning of *Stovall* v. *Denno, supra.*

United States v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967) found need of impartial and selective identification procedures, and thereby the need for counsel, even when a lineup is held in part because the reliability of any identification of a stranger is severely limited by normal human fallibilities of perception and memory. A showup, on the other hand, results in the maximization of suggestion that the suspect is the guilty party and suggestion is the " 'one factor which, more than anything else, devastates memory and plays havoc with our best intended recollections * * *.' "[9] Suggestion is in large

[9] Wall, Eyewitness Identification in Criminal Cases 26.

part the product of restricted selectivity offered the witness in the identification process. Instead of being forced to choose between several persons with different heights, weights, profiles and voices, Mrs. Beamer was confronted with a single individual whose suspected guilt the police communicated by presenting him alone and in custody. The witness is free to accept or reject this police judgment, but not to choose. With good reason, therefore, the showup is labelled "the most grossly suggestive identification procedure now or ever used by the police." Wall, Eyewitness Identification in Criminal Cases 28. See also, *Stovall* v. *Denno,* 388 U.S. 293, 302 n. 5 (1967).[10]

In identifying petitioner, Mrs. Beamer relied particularly on her recollection of a voice she had not heard in seven months, but selectivity is decreased even more when identification is by voice. An identification by physical appearance may rest upon various characteristics, one or a combination of which may be particularly striking; such as the shape of a nose or mouth, skin complexion, scars, or height and weight. Voice identification rests merely upon the tone and timbre of a voice, as well as an individual's speech peculiarities.[11] When few words are spoken and no special speech peculiarities are present, as in this case, only tone and timbre are left to provide identification. Selectivity is at the barest minimum; the probability of error is maximized. Biggers, moreover, spoke

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[10] See The opinion of the Australian Court quoted in Williams, Identification Parades, Crim. L. R., 526 (1955): "The English courts treat it as indisputable that a witness, if shown the person to be identified singly and as the person whom the police have reason to suspect, will be much more likely, however fair and careful he may be, to assent to the view that the man he is shown corresponds to his recollection."

[11] Mrs. Beamer only stated that she identified petitioner's voice because "he has the voice of an immature youth. I have teenage boys and that was the first thing that made me think it was the boy" (R. 17). Thus, she relied on a voice characteristic common to boys in petitioner's age group rather than a manner of speech particular to a single person.

softly during the identification (R. 17). It is difficult to believe the intruder spoke this way during the assault and rape. The unreliability of voice identifications as compared to physical identifications, with the resultant increased necessity for a lineup, was recognized by the Fourth Circuit in *Palmer* v. *Peyton*, 359 F.2d 199, 201-202 (1966):

> "Where the identification is by voice alone, the absence of some comparison involves grave danger of prejudice to the suspect, for as one noted commentator has pointed out: '[E]ven in ordinary circumstances one must be cautious and accept only with reserve what a witness pretends to have heard * * *.'"

This Court rigorously questioned the reliability of all identification testimony in *United States* v. *Wade, supra*, and quoted with approval Mr. Justice Frankfurter's observation that: "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." The Case of Sacco and Vanzetti 30. If this characterization applies to an identification by lineup, where comparison and selectivity are greatest and suggestion minimal, it applies with far greater force to the showup in this case where Mrs. Beamer could only accept or reject police suspicion that Archie Biggers was the rapist, and where the showup identification was the sole evidence of guilt, see *infra* p. 17.

The holding in *Stovall* that absent unusual circumstances a show-up violates the due process rights of an accused is also soundly rooted in the policy adopted in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967). Those cases envision that "presence of counsel itself can often avert prejudice and assure a

meaningful confrontation at trial." (388 U.S. at p. 236). Suggestion is to be prevented by an attorney calling the attention of the police to identification procedures which produce it and by proposing safeguards. For the attorney to play a practically meaningful role as insurer of the integrity of the pre-trial identification proceedings, practices such as the showup which result in undue suggestion must be condemned or counsel is reduced to the role of passive observer, unable to prevent unreliability and reduced to attempting to expose it after the fact at trial. If counsel is unable to assert that a procedure as destructive of reliability as the showup is unconstitutionally suggestive, it is difficult to see how he will be able to assist law enforcement as *Wade* presupposes "by preventing the infiltration of taint in the prosecution's identification evidence" (388 U.S. at p. 238).

B. *The Circumstance of the Identification and Its Use at Trial Violate Due Process.*

This case, however, goes far beyond *Stovall, supra.* The record affirmatively shows that petitioner's identification, and the use made of it by the state, denied him the fair trial guaranteed by the Fourteenth Amendment. The circumstances which denied Archie Biggers due process will be separately examined, but, of course, their prejudicial impact upon his trial is cumulative.

First. Prior to the police call "to look at a suspect" Mrs. Beamer was particularly open and susceptible to suggestive influence. The crime had occurred seven months earlier and had lasted at the most 30 minutes; inevitably the sharpness of her memory had faded. Mrs. Beamer, by her own admission at trial, was terrified by fear of violence to herself and children. When asked (R. 14):

> Q. "Are you able to describe this man other than seeing a butcher knife?"

She replied:

> A. "No, other than I remember the blade being shiny."

The crime took place at night. Mrs. Beamer was grabbed in an unlit hallway and marched through an unlit kitchen to railroad tracks and then to a wooded area. At trial, she gave only a general explanation of the characteristics which led her to identify petitioner. As the Court said in *Wade*, the danger of suggestion is "particularly grave when the witness' opportunity for observation was insubstantial. . . ." (388 U.S. at p. 229).

Second. The police suggested that the petitioner was the rapist when they arrived at Mrs. Beamer's home and asked her to go "look at a suspect." Inherent in the word "suspect" was the suggestion that the police had sufficient evidence linking the petitioner to the crime to warrant holding him at the police station for her identification. Thus the normal expectation of a witness that the guilty person will be present at the identification was substantially increased by the police. Cf. Williams, Proof of Guilt, 96.

Third. At the station house Mrs. Beamer first saw Archie Biggers in the custody of five police officers, all of whom remained present during the identification. The sheer number of officers, implying the importance of the petitioner as a "suspect", may well have allayed any thought by the witness that this might not be "the man." [12]

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[12] On the morning of the identification the only morning newspaper in Nashville carried a front-page story of the attempted rape for which petitioner had been arrested. Biggers was not named, but he was described as a "burly 16 year-old Negro." If the prosecutrix read the article, which is not revealed in the record, the crime allegedly committed and the description of the rapist might well have influenced her identification of Biggers. The prejudicial effect of newspaper articles upon witnesses and jurors has been recognized by this Court. Cf., *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Estes* v. *Texas*, 381 U.S. 532 (1965).

On the other hand, the number of officers may have increased her fear of contradicting the police as to the identity of a man regarded by them for reasons unknown to her as a "suspect."

Fourth. When Mrs. Beamer did not identify Biggers by his physical appearance, the police required him to speak words spoken during the attack—"Shut up or I'll kill you."—and eventually his compelled speech was presented to the jury at trial. There is little that could have been more suggestive of his guilt. Mrs. Beamer had not indicated that the rapist had particular speech mannerisms which required those words to be spoken, and even if he had had speech peculiarities he could have spoken other sentences of phrases containing each of these words. Whether or not a violation of petitioner's Fifth Amendment rights (see Argument II, *infra*) use of the rapist's precise words was unnecessarily suggestive.

Wall has evaluated the latter two suggestive techniques used in this case. He states that "As bad as a show-up is, there are a number of ways it can be made worse. • • • One method is to point out the suspect to the witness even before the showup, indicating his status as suspect. • • • If this practice is not deemed suggestive enough, then the suspect, when shown alone, can be required to act or speak in the manner in which the perpetrator of the crime is supposed to have acted or spoken, a method adopted, for example, in the Sacco-Vanzetti case." Eyewitness Identification in Criminal Cases 30.

Fifth. Archie Biggers was unprepared and unequipped to protect himself against an identification made unfair by suggestions to the witness. He was 16 years old, had a ninth grade education, and apparently no previous police

record.[13] His immaturity, relative lack of education, and unfamiliarity with police procedures combined to make it difficult for him to intelligently safeguard himself against suggestive influence at the identification. Cf. *Haley* v. *Ohio*, 332 U.S. 596 (1948); *Gallegas* v. *Colorado*, 370 U.S. 52 (1962); *In Re Gault*, 387 U.S. 1 (1967).[14] This vulnerability to police procedures suggesting his guilt was further increased by the failure to notify Biggers' family of the identification despite the fact that his mother was available, the police having notified her earlier on August 17th that her son was being held on an unrelated charge. While the nonretroactivity of the Sixth Amendment holding of *Wade, supra* and *Gilbert, supra,* precludes reversal solely on the basis of lack of counsel, the consequences of an identification proceeding held without an attorney present must be noted as they affect an accused's right to a fair trial. Cf. *Davis* v. *North Carolina,* 384 U.S. 737, 740, 741 (1966). Placed in an unfamiliar situation and seized by the natural fear of one whose liberty depends upon another, an accused is unlikely either to reconstruct completely or be capable of testifying to all the suggestive influences which would reflect on the witness' impartiality and credibility. An accused as young and inexperienced as Archie Biggers is particularly affected by these disabilities. We can never know if additional suggestive influences may have further tainted the identification in this case, but we do know that the procedure employed maxi-

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[13] A number of witnesses testified to Biggers' good character and reputation. When he took the stand, there was no attempt to impeach his credibility by introduction of a police record.

[14] What the Court said in *Haley* applies: "What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. * * * He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." (332 U.S. 596, 599-600).

mized potential suggestion without the protective presence of counsel to protect the right to cross-examine, *Pointer* v. *Texas*, 380 U.S. 400, 404 (1965).

Sixth. The pre-trial identification was exploited at trial by the State's complete reliance on the tainted identification. Although she came to within a foot of the assailant, Mrs. Beamer's young daughter could not identify Biggers. Mrs. Beamer did not attempt an in-court identification. The pre-trial identification was offered by the state and was presented emphatically to the jury as the difference between guilt and innocence. No other evidence of guilt was presented although testimony elicited by the prosecution from four police officers as to what transpired at the identification made it appear to the jury that Mrs. Beamer's testimony was corroborated,[15] see *United States* v. *Wade*, 388 U.S. at p. 247 (opinion of Mr. Justice Black). According to the prosecuting attorney, the excitement of the crime was proof of accuracy of the subsequent identification. Professor Borchard's studies show, however, "that the emotional balance of the victim or eyewitness is so disturbed by his extraordinary experience that his powers of perception became distorted and his identification is frequently most untrustworthy" Convicting the Innocent, XIII (1961). This is especially true in a rape prosecution where, as the Court has recognized, identification presents "a particularly hazard that a victim's understandable outrage may excite vengeful or spiteful motives" *United States* v. *Wade*, 388 U.S. at p. 230.

Seventh. Without exception, the state could have employed procedures to safeguard the fairness of the identifi-

[15] In Tennessee, it is not mandatory that testimony of a violated female be corroborated. *Carroll* v. *State*, 212 Tenn. 464, 370 S.W. 2d 523, 527 (1963); *King* v. *State*, 210 Tenn. 150, 357 S.W. 2d 42, 45, 46 (1962).

cation and trial but did not do so. There was no practical impediment to a lineup. The witness need not have been told Biggers was a suspect. He did not have to repeat the precise language used by the criminal. Parents and counsel were available and could have been present. The number of officers at the identification was surely excessive and their testimony at trial served only to prop up a thin case. No in-court identification was offered. It was unnecessary for the state to initiate reference to prejudicial newspaper accounts of Biggers' arrest and identification or to permit the jury to learn that Biggers spoke the words of the criminal. Finally, it may have been good advocacy for the prosecuting attorney to tell the jury that "violence and terror . . . fixes these matters indelibly in a person's mind" (R. 177) but it hardly speaks of dedication to "making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime" *United States* v. *Wade*, 388 U.S. at p. 256 (opinion of Mr. Justice White).

The unfairness which began with the police labelling petitioner a "suspect", extended through an identification replete with suggestion that he was the rapist from which he could not safeguard himself, and culminated at a trial in which the tainted identification was the sole basis of conviction. At every turn the police acted in such a way as to make a reliable identification impossible. Archie Biggers has been denied the fundamental fairness guaranteed him by the due process clause of the Fourteenth Amendment and his conviction should be reversed.

II.

Petitioner's Rights Under the Fifth Amendment Were Violated by the State's Use at Trial of What He Was Compelled to Say at a Pretrial Identification.

When petitioner was identified by the victim he was being held at the police station in the custody of five officers. Neither his parents nor attorney was present. The police brought petitioner in Mrs. Beamer's presence and required him to repeat the words spoken by the rapist at the time of the offense: "Shut up, or I'll kill you." From the sound of these few words—spoken seven months earlier during disturbing events which lasted from 10 to 30 minutes—Mrs. Beamer identified Archie Biggers as the man who had raped her. At trial, in response to questions asked by the prosecuting attorney, Mrs. Beamer and four police officers, all witnesses for the state, testified to the circumstances of the identification, including that petitioner said "Shut up, or I'll kill you." Petitioner contends that the State of Tennessee violated his privilege against self-incrimination by compelling him to speak words used by the criminal at a pre-trial identification and by introducing the compelled statement into evidence against him at trial to bolster the pretrial identification.

In *United States* v. *Wade,* 388 U.S. 218, 220 (1967), the defendant was required at the lineup to wear strips of tape such as allegedly worn by the robber and directed to say "something like 'put the money in the bag,' the words allegedly uttered by the robber." Evidence of what Wade was compelled to say and do at the lineup was introduced at trial by his counsel on cross-examination. A Fifth Amendment claim was rejected, in part, on the ground that the government did not adduce evidence of what was said or done at the lineup as part of its proof of guilt:

> Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicated his privilege. The government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross-examination of the employees involved no violation of Wade's privilege. (388 U.S. at p. 223).

Petitioner submits that admission at trial of what he was compelled to say evokes "the spirit and history of the Fifth Amendment", *Schmerber* v. *California*, 384 U.S. 757, 764 (1966).[16] What Mr. Justice Black said in *Wade* applies to use of petitioner's speech: "I would reverse

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[16] Historically, there have been two views of the Fifth Amendment: one exemplified by Wigmore and one reflected by decisions of this Court. Wigmore's view, based on his understanding of the origins of the privilege, is that it is "directed at the employment of legal process to *extract from the person's own lips* an admission of guilt", 8 Wigmore, Evidence §2263 (McNaughton Rev. 1961); see *Schmerber* v. *California*, 384 U.S. at p. 762 note 7. Central to his thesis, is the belief that only the guilty avail themselves of its protection and thus, it did not apply "when there was no direct coercion by the government and when there was no formal charge to which the unanswered questions relate." *Deluna* v. *United States*, 308 F.2d 140, 145 (5th Cir. 1962); Wigmore, Nemo Tenetur Seipsum Prodere, 5 Harv. L. Rev. 71, 85 (1891). As Judge Wisdom put it in *Deluna, supra*, Wigmore's "writings are an inexhaustible quarry of quotations apt for use against the policy of privilege."

This Court, however, has never sat to enforce Wigmore on Evidence and its decisions emphatically reject a narrow or literal reading of the privilege or limitation of its protection to "direct coercion" or "formal charge." Although the language of the Fifth Amendment certainly is susceptible to narrow reading the Court held that the Amendment protects against compulsory production of potentially incriminatory written records in "the great case" (*Malloy* v. *Hogan*, 378 U.S. 1, 9 (1964)) of *Boyd* v. *United States*, 116 U.S. 616 (1886); that its exercise is not limited to criminal proceedings, *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892); *Arndstein* v. *McCarthy*, 266 U.S. 34 (1924); and applies to indirect compulsion to testify, *Griffin* v. *California*, 380 U.S. 609 (1965); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); to non-judicially compelled admissions, *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964) and to police interrogation, *Miranda* v. *Arizona*, 384 U.S. 436 (1966). By holding it

Wade's conviction without further ado, had the prosecution at trial made use of his lineup identification either in place of courtroom identification or to bolster in a harmful manner crucial courtroom identification" (388 U.S. at p. 247). Certainly, nothing in *Schmerber supra,* or *Wade supra,* should deny petitioner the protection of the privilege. The former upheld the constitutionality of extraction of a blood sample because evidence of the test was neither "testimony nor evidence relating to some communicative act or writing," but declined to adopt the Dean Wigmore's formulation of the privilege or to endorse "past applications of the distinction between testimonial compulsion and real or physical evidence." It was recognized that application of such a distinction would depend on the incriminatory circumstances of each evidentiary seizure:

> "There will be many cases in which such a distinction [between testimonial communications and real or physical evidence] is not readily drawn. Some tests seemingly directed to obtain 'physical evidence', for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or

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serves innocent as well as guilty, the Court has rejected a premise central to a restrictive conception of the privilege:

> "[R]ecent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is 'to protect the innocent who otherwise might be ensnared by ambiguous circumstantes.'" Harlan, J., *Grunewald* v. *United States,* 353 U.S. 391, 421 (1957).

Contrary to the Wigmore formulation, decisions of the Court have been more in keeping with the view of the privilege Dean Griswold has expressed, that it is "one of the great landmarks in man's struggle to make himself civilized," and should be liberally construed. Griswold, the Fifth Amendment Today (Harv. Press, 1955), p. 7.

innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment" (384 U.S. at p. 764).

Unlike petitioner's case, the lineup statements in *Wade* were not introduced at trial by the government as proof of guilt but by defense counsel on cross-examination, a distinction emphasized by the Court.

Regardless of the purpose for which initially extracted, compelled speech used as evidence at trial is testimonial communication rather than real or physical evidence. The speech is presented as proof of guilt before the tribunal which decides to convict or to acquit. No record can adequately reveal, no counsel can adequately guard against, the subtle incriminatory shading or emphasis which a witness may supply, wittingly or unwittingly, in repeating a defendant's compelled statement, in this case the inflammatory words "Shut up or I'll kill you." [17] Even if the witness repeats the speech in a neutral, detached manner the jury cannot be expected to remain untouched by the fact that the defendant played the role of the criminal. Thus, the identification itself is bolstered by evidence supplied solely as a result of compulsion of an accused. Testimony of petitioner's speech, especially when the words are those of the criminal, is "affirmative action which may not merely identify him, but tie him directly to the crime" in the eyes of the jury, *Gilbert* v. *California,* 388 U.S. 263, 291, 292 (1967) (opinion of Mr. Justice Fortas).

Identification, by whatever method, is similar to and has much the same legal effect as self-incrimination. This case illustrates that compelled speech whatever its initial

[17] "There are not many ways of writing 'tonight' but Stanislavsky used to ask his young actors to pronounce and stress it fifty different ways while the audience wrote down the different shades of feeling and meaning expressed" McLuhan "Understanding Media" 82 (Signet ed.).

purpose opens an accused to the perils of incrimination. A sixteen year old boy with no criminal record was brought into the victim's presence surrounded by policemen, without the benefit of a lineup, counsel, or family, and was compelled to utter, not some innocent phrase, but the exact words alleged by the victim to have been used by the rapist. These are circumstances calculated to induce self-accusation in the innocent-but-weak but "history teaches us that self-accusation is an unreliable instrument of detection, apt to inculpate the innocent-but-weak and to enable the guilty to escape" *United States* v. *Wade,* 388 U.S. at p. 261 (1967) (opinion of Mr. Justice Fortas). The risk of incrimination affecting the trial is confined if the state is not permitted to rely on what was said or done at the lineup. On the other hand, if the state is able to profit at trial from speech at an identification proceeding, there is incentive to induce an incriminating response.

While compelled speech maximizes the risk of incrimination, use by the state of officially compelled speech at trial is substantially unlike other required acts which have been held beyond the scope of Fifth Amendment protection, e.g., compelling a defendant to stand for the purpose of visual identification, to submit to a simple blood test, to being fingerprinted or photographed. Such acts as these require only a minimum physical cooperation which is passive in nature and no act of will. Speech entails a volitional as well as physical exertion. "Had Wade been compelled to utter these or any other words in open court, it is plain that he would have been entitled to a new trial because of having been compelled to be a witness against himself." 388 U.S. at p. 245 (Opinion of Mr. Justice Black). It is as incriminating, however, to permit another to repeat an accused's compelled speech as to force an accused to speak before the jury. If the state may compel speech for identification purposes and then employ it as

proof at trial through the mouth of one of its witnesses then the state is at liberty to compel an accused to speak the words of the criminal, or to otherwise act out the crime, before the jury. We do not believe that this Court will ever tolerate such a result because "Our history and tradition teach and command that an accused may stand mute" *United States* v. *Wade,* 388 U.S. at p. 260 (opinion of Mr. Justice Fortas).

The need for accurate pre-trial identification may suggest that an accused be forced to speak, but the very holding of *Wade* that such practice does not violate the Fifth Amendment when used solely as aid to pre-trial identification surely renders it unnecessary to permit reenactment before judge and jury where it becomes direct proof of guilt supplied solely by the involuntary actions of an accused. This distinction, between compelling speech and using compelled speech as evidence to support conviction and punishment, is at the center of this Court's decision in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964); see also opinion of Mr. Justice White, 378 U.S. at pp. 100, 101.

It is petitioner's position that use of his compelled speech at trial is use of testimony relating to a communicative act within the scope of the privilege. We do not hesitate, however, to challenge the sense of any potentially controlling distinction between testimonial communication and real evidence for purposes of the Fifth Amendment. With deference, we think the roots of the Amendment are deeper. Its true scope protects against governmental overbearing of a person's will. An individual has the right to be protected from coercion designed to make him do something controlled only by his will, which is the heart of a person's being and the source of his individuality. To invade this sanctuary is to destroy the well-spring of his integrity and

dignity as a human being. These are values which the Fifth Amendment seeks to shield from governmental intrusion by "physical or moral compulsion," and they apply full force to the volitional cooperation inherent in compelled speech.

We recognize that the Court faces a continuing dilemma in construing the privilege because there is a natural tension between the privilege and the potentially incriminating nature of any criminal investigation. When a suspect is arrested, placed in a lineup, fingerprinted, photographed, the incriminating hammer is always cocked. On the other hand, restriction of the privilege to its narrow origin, as Wigmore would have it, would be as stultifying as carrying it to its logical end. But a construction of the privilege which turns solely on the application of a distinction between real evidence and testimonial communication fails to relate to the values the Fifth Amendment protects or its critical contemporary role as a protection of individual liberty. It was this recognization of the roots of the privilege in personal dignity that led to rejection of the Wigmore view in *Schmerber*. It would make the individual the "deluded instrument of his own conviction" in all too many cases, Mr. Justice Frankfurter in *Watts* v. *Indiana*, 338 U.S. 49, 54 (1949) quoting from 2 Hawkins, Pleas of the Crown (46 §34) (8th Ed. 1824), and contravene the "respect a government—state or federal—must accord to the dignity and integrity of its citizens" *Miranda* v. *Arizona*, 384 U.S. 436, 460 (1966).

It is degrading to require one against his will to act the role of any other person because to do so tampers drastically with personal identity. Indignity is intensified when one is forced to act the role of a criminal. The slight physical cooperation required in a blood test may not amount to unconstitutionally "forced cooperation by the

accused" but this Court should make clear that when compelled speech is offered as evidence by the state in a court of law, and used to support a jury verdict, the result is compulsory self-accusation which the Fifth Amendment will not tolerate. *United States* v. *Wade*, 388 U.S. at p. 260, 261 (opinion of Mr. Justice Fortas).

CONCLUSION

Wherefore, Petitioner Prays That the Judgment Below Be Reversed.

Respectfully submitted,

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioner

JOHN P. HOWLAND
11 Hillcrest Road
Port Washington, New York

Of Counsel

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 237.

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF FOR RESPONDENT.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,
ROBERT F. HEDGEPATH,
Assistant Attorney General,
State of Tennessee,
Attorneys for Respondent.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 237.

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF FOR RESPONDENT.

MAY IT PLEASE THE COURT:

The respondent State of Tennessee for its brief respectfully shows to the Court:

OPINION BELOW.

The opinion of the Supreme Court of Tennessee was released on January 12, 1967, for publication and can now be found at 211 S. W. 2d 696.

JURISDICTION.

Jurisdiction was originally sought by the petitioner upon the authority of 28 U. S. C., Section 1257 (3). Certiorari was granted by this Court on June 12, 1967.

CONSTITUTIONAL PROVISIONS.

This case directly involves the Fourteenth Amendment and indirectly involves the Fifth and Sixth Amendments to the Constitution of the United States.

QUESTION PRESENTED.

Were the circumstances surrounding the identification of the petitioner by the victim such as to deny the petitioner due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE.

Mrs. Margaret Work Beamer, a Negro mother of five, testified that she was assaulted and raped by the petitioner during the night of January 22, 1965. She was wrestled to the floor by the petitioner who wielded a butcher knife. He threatened to kill both her and her daughter.

Mrs. Beamer stated that although the rape occurred after the petitioner had forced her to leave home and accompany him to a nearby wooded area, she was face to face with her assailant on the floor of the partially lighted hallway of her home (R. 14).

Mrs. Beamer, a licensed practical nurse for fifteen years, stated in the courtroom that it was the petitioner who raped her. This courtroom identification of the petitioner is found in numerous places throughout the record (R. 9, 19).

Following the rape which occurred on January 22, 1965, Mrs. Beamer was shown pictures of possible suspects on numerous occasions (R. 15). She stated that policemen came to her home with pictures and that she also went to the police station to attempt identifications (R. 15). One officer testified that Mrs. Beamer was shown thirty to forty pictures (R. 38, 39). On one occasion, Mrs. Beamer picked out a picture of a man who "had features" like her assailant (R. 15).

Mrs. Beamer identified the petitioner at the police station on August 17, 1965 (R. 16). She said that she came to the police station to identify the suspect if she could (R. 17). The identification of the petitioner by Mrs. Beamer was based upon his size (R. 17, 19), his voice (R. 17), his smooth face (R. 18), and his hair (R. 18). She stated that he had the voice of an immature youth, medium pitched and soft (R. 17).

Upon cross-examination, Mrs. Beamer stated that the police did not point out the petitioner to her but that she was able to identify him at police headquarters (R. 24). She said that the identification about which she testified represented the second time she had seen him, that she had been down to look at him before (R. 24, 25). This particular testimony was not developed further by the defense. Mrs. Beamer further stated upon cross-examination that she got a good look at the petitioner during the rape and that she knew him (R. 33, 34).

A number of police officers testified at the trial concerning the police station identification. The substance of their testimony is that Mrs. Beamer was brought to headquarters to identify, if she could, a suspect. This was not the first such suspect she had been brought in to identify (R. 65). Although counsel for the petitioner objected to the State's showing that the witness had been brought to police headquarters to attempt an identification of other suspects (R. 65), it later developed upon cross-examination that she had looked not only at pictures but at several people (R. 73). Mrs. Beamer was in one of the offices at police headquarters and the petitioner walked by in the hallway and spoke certain words. There was no lineup on this occasion. There was likewise no hesitation in her identification.

The petitioner had been arrested during the night prior to the identification by Mrs. Beamer. He was arrested in connection with a separate offense and had been taken to the Juvenile Court (R. 46), at which time he had been advised of his constitutional rights in his mother's presence (R. 52).

At the time Mrs. Beamer identified him, he was not being held for raping her.

ARGUMENT.

This Court is asked by the petitioner to reverse the holding of the Court below which upheld his conviction for rape. It was insisted in the petition seeking certiorari that the petitioner was denied a fair trial guaranteed him by the Fourteenth Amednment to the United States Constitution when he was forced to speak for identification purposes during a pretrial identification process at which time he was not represented by counsel. The respondent respectfully insists that there was no violation of the petitioner's constitutional rights with respect to the Fifth Amendment guarantee that he should not be forced to give testimony against himself or the Sixth Amendment right that he is entitled to counsel.

This Court must determine whether or not the circumstances under which the defendant was identified by Mrs. Beamer at the pretrial identification process violated the standards of a fair trial which the petitioner is guaranteed under the Fourteenth Amendment to the Constitution of the United States.

The overwhelming weight of authority including the position always taken by this Court is that it is permissible to require a suspect to speak for identification purposes at a pretrial identification. The fact that an accused is required to speak certain words for the purpose of identifying him as the guilty party does not violate the Fifth Amendment privilege. **8 Wigmore on Evidence,** Sec. 2265, pp. 386, 396 (McNaughton, Rev. 1961); **Lenoir v. State,** 197 Md. 495, 80 Atl. 2d 3 (1951); **Johnson v. Commonwealth,** 115 Penn. 369, 9 Atl. 78 (1886); **Johnson v. State (Texas),** 318 S. W. 2d 76 (1958).

The prosecution can require an accused to speak for purposes of identification and can require that he wear clothing which was worn by the guilty party. In **Barrett v. State,** 190 Tenn. 366, 229 S. W. 2d 516 (1950), the accused was required to wear a hat during the identifica-

tion procedure. In **Ross v. State**, 204 Ind. 281, 182 N. E. 865 (1932), the accused was required to grow a beard and place a handkerchief across his face.

This Court upheld a requirement that the accused wear a garment worn by the guilty party in the case of Holt v. United States, 218 U. S. 245 (1910). It is likewise no violation of the Fifth Amendment privilege to require the accused to furnish a specimen of his handwriting. **Bryant v. United States**, 244 F. 2d 411 (5th Cir. 1957).

The history of the privilege against giving testimony guaranteed by the Fifth Amendment teaches that it is only the forced communication of some fact concerning the incident from the accused which is prohibited. The mere muscularization of the vocal cords for the purpose of identification is not the same as eliciting from the accused his awareness of facts concerning the crime. **Holt v. United States**, *supra*. This Court held that the privilege protected by the Fifth Amendment is limited to testimonial disclosures in the case of **Schmerber v. Calif.**, 384 U. S. 757 (1966). See also **Rochin v. Calif.**, 342 U. S. 165 (1952); **U. S. v. Wade**, 388 U. S. 218 (1967).

On June 12, 1967, this Court decided three cases which control the questions raised in this case. In **U. S. v. Wade**, *supra*, and **Gilbert v. Calif.**, 388 U. S. 263 (1967), this Court held that a pretrial identification procedure is a critical stage in a criminal proceeding which requires the presence of defense counsel. It is conceded by the respondent that the defendant was without counsel in the case at bar at the time of the identification, but nevertheless the holding in **Wade** and in **Gilbert** is not retroactive but prospective only. The holding in the case of **Stovall v. Denno**, 388 U. S. 293 (1967) resolves the question with respect to whether or not the respondent must be represented by counsel at his identification procedure.

Although the petitioner was not deprived of his Fifth Amendment privilege against self incrimination nor was

he deprived of his Sixth Amendment right to counsel, this Court is asked to review the circumstances of the identification to determine whether or not they were so suggestive as to deprive the petitioner of his right to a fair trial as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This Court in the case of **Stovall v. Denno**, *supra*, held that although the accused was not denied his Sixth Amendment rights because of the prospective application of **Wade** and **Gilbert**, the matter could be reviewed in order to determine whether a fair trial was given him. This review for the purpose of determining whether or not the identification confrontation was fair, was made upon the authority of **Palmer v. Peyton**, 359 F. 2d 199 (4th Cir. 1966). This Court stated that a "claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it". It is necessary that this Court review the circumstances surrounding the identification of the petitioner in the case at bar. It is significant that the Court in the case of **Palmer v. Peyton** reviewed the circumstances and determined that the accused therein was deprived of a fair trial as guaranteed by the Fourteenth Amendment although that particular question had never been raised below. It is also significant that the Court in the **Palmer** case cited no authority upon which it reviewed the circumstances surrounding the identification.

The petitioner Biggers was arrested during the night of August 16, 1967, taken to juvenile court and released by the juvenile court to the metropolitan police of Nashville. Mrs. Beamer had been raped months earlier and had from time to time visited the police department in an attempt to identify suspects. She was called to identify if possible the petitioner while he was being held on a separate and unrelated charge. He had been advised at the juvenile court of his constitutional rights as had his

mother. He was displayed to Mrs. Beamer at police headquarters and asked to speak certain words. She had reviewed police files and viewed suspects during the months since her rape. The identification which she made of Biggers was not the product of suggestion but was the result of many months of investigation. Mrs. Beamer identified the petitioner in Court also. There is no indication that her identification in the courtroom was the result of police suggestion nor is there any indication that her identification in the courtroom was the result of or influenced by her identification before trial.

In the **Stovall** case the accused was handcuffed to one of five police officers who, along with members of the District Attorney's Office, brought him to a hospital room in which the victim of the assault was confined. He was identified by the victim from her hospital bed after having been required to speak "words and voice identification". This Court held that the circumstances were not such as to indicate that the petitioner Stovall was deprived of his right to a fair trial as guaranteed by the Fourteenth Amendment. The facts in the **Stovall** case are very similar to the facts in the case at bar.

This Court should affirm the conviction of the petitioner for rape. There is nothing in the record to indicate that the petitioner has been deprived of his right to due process.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

ROBERT F. HEDGEPATH,
Assistant Attorney General,
State of Tennessee,
Attorneys for Respondent.

SUPREME COURT, U. S.
MOTION FILED DEC 6 1967

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 237.

ARCHIE NATHANIEL BIGGERS,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

SUPPLEMENTAL BRIEF

In Opposition to the Petition for the Writ of Certiorari.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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v.

STATE OF TENNESSEE,
Respondent.

SUPPLEMENTAL BRIEF

In Opposition to the Petition for the Writ of Certiorari.

MAY IT PLEASE THE COURT:

Counsel for the respondent, State of Tennessee, requests permission to file this supplemental brief in opposition to the petition for writ of certiorari in this cause on the question of whether or not the petitioner was denied due

process of law by the identification procedure followed at the police headquarters shortly after the petitioner was taken into custody August 18, 1965, upon another charge.

Mrs. Margaret Work Beamer, who was raped about 9:00 p. m., January 22, 1965, was escorted to police headquarters by members of the police force who informed her that they had a suspect for her to view and determine if she could—whether or not he was the man who raped her. When the petitioner was brought into her presence after her arrival there, she looked at him and asked that he say the words "Shut-up, or I will kill you", whereupon she was able to positively and unequivocably identify the petitioner as her assailant (Tr. 17).

She was asked what characteristics petitioner had which enabled her to identfy him and she replied (Tr. 17):

> "Well, he has the voice of an immature youth—I call it an immature youth. I have teen-age boys—and that was the first thing that made me think it was the boy."

She further identified the petitioner in these words (Tr. 18-19):

> "No, when he placed his face against mine—that was another thing, his skin was rather smooth, as, you know, someone that didn't have to shave. His hair was the next thing.
>
> What about his hair?
>
> Sort of bushy.
>
> . . . . . .
>
> Yes, the hair—a little longer than it is now, but—at the time when I identified him it was a little longer——
>
> . . . . . .

What about his physique?

Well, as I said, the size. He had—well at the time he raped me, his shirt was unfastened, and he had a large kind of flabby abdomen and breasts."

Contrary to the insistence of counsel for the petitioner Mrs. Beamer did identify the petitioner as the person who raped her at the trial, particularly at page 60 of the transcript, when she replied, "Yes, he did. Yes, sir.", in response to the question, "Mrs. Beamer, I may have already covered this, but, to be sure, I want you to tell the jury whether or not the defendant actually penetrated your vagina with his sexual organ". There was but one defendant in the courtroom, so there is no doubt about who was being referred to when the word "defendant" was used. This happened or something similar to it happened throughout the trial.

Also, contrary to petitioner's contention, there is no basis for the insistence that the identification procedure was conducted in a manner which tended to suggest to Mrs. Beamer that the petitioner was the one who raped her, or that she was influenced to any extent by anything the police did or said in her identification of him; but, on the other hand, the record read fairly shows that Mrs. Beamer was exceedingly cautious in her identification of the petitioner and that her identification of him was most reliable. Counsel for petitioner would have this Court believe that Mrs. Beamer did not identify the petitioner until his picture appeared as the perpetrator of a similar offense in the **Nashville Tennessean** on the morning of August 18, 1965, but again a fair reading of the record shows beyond doubt that this contention is unwarranted or unjustified (Tr. 17 and 47). One State witness on cross-examination did indicate to the contrary (Tr. 41), but admitted on redirect examination that he did not know (Tr. 42).

In the first place, she viewed thirty to forty photographs of possible suspects (Tr. 39) and she was called or driven to City Hall for the purpose of identifying the person who raped her several times between the date on which she was raped and the date of the petitioner's arrest (Tr. 25 and 73). She never identified any suspect. The closest she came was the observation that one of the photographs portrayed a man who had features like the petitioner (Tr. 15).

The foregoing circumstance itself adds a great deal of credence to Mrs. Beamer's identification of the petitioner as her assailant when coupled with the undisputed evidence that petitioner had no police record until his arrest on August 17, 1965. Until that date (date of petitioner's arrest) they had no photographs of him for Mrs. Beamer to identify and he was not available for her to identify at City Hall during the period of time between commission of the offense and the petitioner's arrest.

Mrs. Beamer's daughter who saw the petitioner just after his attack upon her in their home could not identify the petitioner at the trial, but she was able to describe the person who attacked her mother as a large person, Negro, who had a young voice (Tr. 83-84). Her (Mrs. Beamer's) daughter corroborated her mother's testimony by testifying that petitioner on the occasion wore a short sleeved shirt and petitioner "said he would kill me and her both" (Tr. 84).

One reason advanced to show that petitioner was denied "due process" during his identification is that he was sixteen years of age, had a ninth grade education and no police record (Petitioner's Brief, Pages 15-16). (The record does not show the extent of his education.) The record does not indicate that Mrs. Beamer identified petitioner because of his inexperience or lack of education

but because of his physical appearance and the sound of his voice.

Before **United States v. Wade**, 87 S. Ct. 1926, **Gilbert v. California**, 87 S. Ct. 1951, and **Stovall v. Denno**, 87 S. Ct. 1967, there may have been grounds for insisting that requiring petitioner to speak before Mrs. Beamer violated his Fifth Amendment right not to give evidence against himself and such an argument was the basic argument made in petitioner's behalf even on appeal before the State Supreme Court, but since the decision on those cases there no longer remains any room for such an argument.

It is not suggested what an attorney or relatives might have done in this particular case had they been present. They certainly could not have objected to petitioner's being required to talk and if petitioner had been placed in a lineup Mrs. Beamer surely would have been able to identify him. She had looked at suspects and photographs of suspects for a period of nearly seven months and had made no erroneous identification of any of them. Exhibiting suspects to a witness separately over a long period of time could very well be a greater safety measure for a not guilty person than placing them all in one line on one occasion.

Mr. Wall in his Treatise, **Eye-Witness Identification in Criminal Cases**, lists among a number of "danger signals" which he thinks might increase the probability of a mistaken identification the fact that a considerable period of time elapsed between the witness' view of the criminal and his identification of the defendant. Counsel for the respondent insist that such a conclusion if valid at all is not applicable in this case because Mrs. Beamer under the circumstances exhibited an attitude of coolness and clearness of mind that might have not been possible due to her being emotionally upset at the time or immediately after the incident occurred.

Some of the other "danger signals" listed by Wall were present in the identification of petitioner. The petitioner could not be identified by Mrs. Beamer's daughter and Mrs. Beamer had a limited opportunity to see the petitioner before the crime; but these are minimized by the totality of the circumstances, particularly the lack of any discrepancy between her description of him and his actual appearance and the fact that both petitioner and Mrs. Beamer were of the same race and the fact that Mrs. Beamer made a very positive identification of the petitioner after seeing him and hearing his voice.

The rule to be followed in this case since it came after the decisions in **United States v. Wade**, *supra*, and **Gilbert v. California**, *supra*, is found in **Stovall v. Denno**, *supra*, in these words:

> "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . ." (p. 1972).

In **Stovall**, the totality of the circumstances surrounding the confrontation in such a case seems to be the lack of any other alternative even though the identifying witness, Mrs. Behrendt, was in such a condition it could not be determined whether or not she would long survive the attack made upon her, a circumstance which incidentally might have rendered her identification most unreliable.

What amounts to "due process" depends upon the circumstances. In **Bradford v. School District No. 20**, 244 F. Supp. 768, 773, it was defined thusly:

> "What constitutes 'due process' within the meaning of the Fourteenth Amendment cannot be precisely

defined. It must be decided in the light of that which is just and reasonable, considering all factors, and cannot unduly confine those officials who have the responsibility of governing. As stated by Mr. Justice Frankfurter in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 163, 71 S. Ct. 624, 644, 95 L. Ed. 817 (1951):

> "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.'"

The totality of the circumstances surrounding the identification of the petitioner in this case is not inconsistent with the foregoing principle. The burden is upon petitioner to show that the procedure followed was in fact unfair to the petitioner. This they have been unable to do. An investigation extending over several months cannot as a practical matter be done with all the safeguards and finesse that may be employed when only one "real hot" prospect and one investigation is involved. To follow such procedure in an extended type of investigation more general than specific would involve an enormous amount of time and police man hours, more than perhaps any municipal police force has available; nor is such an abundance of caution necessary in an investigation as this was, one in which neither the police nor the victim appear to be highly emotional and excited to the extent that they are determined to have some person identified as the offender.

In view of all the foregoing, counsel for the State of Tennessee insist that the petition for certiorari in this

cause should be dismissed and the judgment of the Tennessee Supreme Court left undisturbed.

Respectfully submitted,

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee.

Certificate of Service.

I, Thomas E. Fox, Deputy Attorney General of the State of Tennessee, certify that I have mailed copies of the foregoing supplemental brief in opposition to the petition for writ of certiorari to:

Honorable Michael Meltsner
Attorney at Law
10 Columbus Circle
New York, New York

Honorable Anthony G. Amsterdam
3400 Chestnut Street
Philadelphia, Penna.

Honorable Avon N. Williams
Attorney at Law
Charlotte at Fourth
Nashville, Tennessee

on this the 5th day of December, 1967.

Thomas E. Fox,
Deputy Attorney General.

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IN THE

Supreme Court of the United States

October Term, 1967

No. 237

ARCHIE NATHANIEL BIGGERS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

REPLY BRIEF FOR PETITIONER

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioner

JOHN P. HOWLAND
11 Hillcrest Road
Port Washington, New York

Of Counsel

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REPLY BRIEF FOR PETITIONER

By leave of Court, respondent has filed a Supplemental Brief. Pursuant to Rule 41(3), petitioner files this brief in reply.

1. Respondent contends that Mrs. Beamer, in addition to testifying at length as to her out-of-court identification, identified petitioner in the courtroom. This is true, says respondent because she spoke of the "defendant" and "There was but one defendant in the courtroom" (Supp. Br. p. 3).

Such a contention fundamentally misconceives the character of physical identification. The act of identification is not a matter of speaking a name or knowing a status. Rather it is locating a particular physical presence, a body, among other physical presences. It is no accident that the standard means of identification in the courtroom em-

ployed by trial lawyers is to ask a witness whether the person to be identified is present in the courtroom and, if so, to point him out. Although represented by experienced counsel, the state failed to follow the standard procedure in this case. Mrs. Beamer was never asked to locate Mr. Biggers or the "defendant" in the courtroom.

There are important policy reasons, moreover, why a courtroom identification should not be inferred. It would be unwise to reduce the extent to which a witness must commit himself or herself in locating the person named the criminal, for reasonable explicitness in pointing out the person identified makes the witness expressly responsible for his or her judgment. This sense of personal responsibility enhances the degree of caution a witness will exercise in making a decision which involves a grave potential for prejudice.

Of course, even if the record in this case did establish an in-court identification, petitioner's conviction would still have to be set aside by reason of the fact that the major portion of Mrs. Beamer's testimony was a description of her tainted pre-trial identification, see *Gilbert* v. *California*, 388 U.S. 263, 272-73 (1967).

2. Respondent appears to believe that petitioner contends Mrs. Beamer did not identify him until his picture appeared in the *Nashville Tennessean* on the morning of August 18, 1965. Petitioner makes no such claim. What he does urge as a factor to be considered in appraising the totality of circumstances is that Mrs. Beamer may have been influenced by a story in the previous day's *Tennessean*, August 17, 1965 describing the arrest of a Negro youth who would be questioned about a series of rapes (R. 196; Pet. Br., p. 14, n. 12) and, more signif-

icantly, that a factor contributing to the fundamental unfairness of the proceedings below was the state's totally unwarranted and prejudicial interjection of the existence of the August 18, 1965, newspaper photograph.

At the beginning of the trial, the prosecuting attorney, over objection, asked Mrs. Beamer whether she had identified Biggers "before or after something appeared in the newspaper" (R. 17). She answered

> "It was before the picture was published, the next morning."

The record reveals that it took some three or four days to select a jury in this case in part because several jurors had seen newspaper stories about Biggers (R. 58, 59, 175). Thus, the state's initial reference to the newspaper photograph presented a dilemma for petitioner's trial counsel. They could let the reference go unexplained and hope that the jury would disregard it, or they could attempt to test the credibility of Mrs. Beamer's testimony. In either event the foreign and prejudicial element had been placed before the trial jury. Counsel attempted the latter course with the result that, while one police officer was uncertain whether the picture appeared prior to or subsequent to the identification, the state introduced cumulative testimony to establish that the identification took place prior to the day the photograph appeared in the newspaper (R. 47, 66, 97-103; cf. 182). This testimony detracted from the fairness of trial not only because it was irrelevant to the question of guilt but because it was calculated to arouse juror's memories of newspaper accounts and photographs describing Biggers as a confessed rapist, making impossible any objective assessment of Mrs. Beamer's identification testimony. Thus, by bringing up the matter of the

photograph, the state significantly impaired the integrity of the guilt finding process.

3. The Supplemental Brief asserts that Mrs. Beamer "had looked at suspects and photographs of suspects for a period of nearly seven months and had made no erroneous identification of any of them" (p. 5). The record, however, is totally silent with respect to times, dates, character and circumstances of Mrs. Beamer's viewing of photographs and suspects. Such viewings may have taken place within a day or week of the crime. They may have been line-ups or show-ups. Rogues gallery photographs may have been employed. Pictures may have been presented individually or in groups. Suggestion may have been directed to her or the viewings may have been arranged with scrupulous regard for fairness. To the extent the highly unreliable procedures employed in presenting petitioner to Mrs. Beamer seven months after the crime are sought to be explained away by the supposed reliability of Mrs. Beamer's failure to identify anyone prior to August, it is respondent's burden to show the facts and circumstances which make reliable an otherwise unreliable manner of proceeding, *Cf. United States* v. *Wade*, 388 U.S. 218, 240, n. 31, 241 (1967). Otherwise petitioner would be presented with an impossible task of negating any factor possibly enhancing reliability where the proof of such factors, if they exist, is within the exclusive knowledge of the state. Whatever its potential application to some other case, it does not serve the state well here to assert that "exhibiting suspects to a witness separately over a long period of time could very well be a greater safety measure for a not guilty person than placing them all in one line on one occasion" because the state never proved that suspects were exhibited to Mrs. Beamer "over a long period of time" (Supp. Br. p. 5).

The state also contends that "An investigation extending over several months cannot as a practical matter be done with all the safeguards and finesse that may be employed when only one 'hot' prospect and one investigation is involved" (Supp. Br. p. 7). This assertion is likewise unsupported by the record. A lineup was not difficult or even inconvenient to arrange. The identification took place at police headquarters; Biggers was brought there from a juvenile detention facility. There was no shortage of persons to compose a lineup. The many other police failures to safeguard the fairness of the identification proceeding were equally unnecessary, see Pet. Br. pp. 17, 18.[1]

4. The Supplemental Brief asserts (p. 6) that Mrs. Beamer's identification was reliable, although she had a "limited opportunity" to see the petitioner before the crime, because there was a "lack of any discrepancy between her description of him and his actual appearance." This statement erroneously suggests that Mrs. Beamer gave a detailed description of the assailant at the time of her arrest, that such description matched the features of petitioner, and that similarity between the original description and Biggers' appearance bolsters the reliability of Mrs. Beamer's identification. The only problem with this reasoning is that the state never showed the character of any description Mrs. Beamer gave to the police at the time of the crime. At trial, she was asked which characteristics of petitioner enabled her to identify him at the pre-trial identification, but she never testified, nor did any police officer, that she had given any particular descrip-

[1] In addition, the state seems to be saying that where there is evidence tying a suspect to a crime procedural safeguards will be followed but where the evidence is slight and no "hot" prospect is involved safeguards should be abandoned. Such a rule is calculated to convict the innocent because it maximizes suggestion in the case where evidence of guilt is slightest.

tion at the time she reported the crime, or shortly thereafter.

In fact, the only reference in the record to such a description hardly gives one a feeling of great confidence in Mrs. Beamer's ability to observe precisely during the crime (and the state now concedes her opportunity to observe was "limited" (Supp. Br. p. 6)). One of the officers initially assigned to the case was asked "what if anything else did you do in the course of your investigation." He answered: "We had the plaintiff go to the homicide office and give a statement as to what happened and also we got a description as best she could describe the subject and it was taken down. . ." (R. 50). Thus Mrs. Beamer gave a description characterized "as best she could." This description was "taken down" by the police but was never offered at trial to bolster Mrs. Beamer's reliability. Under established principles, the character of the description she gave must be deemed to have hindered rather than helped the state's case for Mrs. Beamer's reliability.

5. Finally, the state finds moment in the fact that Mrs. Beamer "exhibited an attitude of coolness and clearness of mind" (Supp. Br. p. 5) at the out-of-court identification. But it would be surprising indeed if she were not relatively less emotional seven months after the offense. On the other hand, as the state concedes, such coolness was not possible on January 22, 1967 "due to her being emotionally upset at the time or immediately after the incident occurred" (Supp. Br. p. 5). It was, however, at the time the incident occurred that the original perception upon which recollection is based took place. If the initial opportunity to observe was "limited" and the witness "emotionally upset," a seven month subsequent identification,

rendered under the influence of suggestion from the police, is not rendered reliable because emotions have cooled.

Respectfully submitted,

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York 10019

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioner

JOHN P. HOWLAND
11 Hillcrest Road
Port Washington, New York

Of Counsel

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITION FOR REHEARING

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioner

JOHN P. HOWLAND
Of Counsel

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STATE OF TENNESSEE,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITION FOR REHEARING

Petitioner prays that the Court grant rehearing of its March 18, 1968 decision affirming, by an equally divided Court, petitioner's conviction and sentence to twenty years in prison.

Reasons for Granting Rehearing

I

Subsequent to the Court's ruling in petitioner's case, certiorari has been granted to consider, in the case of another state prisoner, those circumstances which result in an identification procedure violating the Due Process

Clause of the Fourteenth Amendment, *Foster* v. *California*, No. 638 Misc., 36 U. S. L. Week 3374 (3/25/68). *Foster* involves a lineup which is alleged to have been unconstitutionally conducted. As petitioner was not accorded the elementary protection of a lineup—and the record is barren of evidence justifying the failure to hold one—reversal in *Foster* would, *a fortiori*, affect, if not determine, final resolution of petitioner's constitutional claim. An intervening circumstance such as "the fact that the same or a related issue has come before the court in other cases still pending" is a common ground for grant of rehearing. Stern and Gressman, Supreme Court Practice, 3rd Ed. 389; see *Pickett* v. *Union Terminal Co.*, 313 U. S. 591 (1941); 314 U. S. 704 (1941); 315 U. S. 386, 389, 394 (1942). It is plainly appropriate and just that the results in these two cases conform. Unless it is beyond doubt that principles announced in *Foster* will not bear upon petitioner's claim, this petition should be granted.

That affirmance is the product of an equally divided Court further supports granting of this petition. The Court has granted rehearing most often in cases such as this where it could not, initially, agree on a decision. Stern and Gressman, *supra*, at 387. The present result works a harsh penalty on a minor without articulate decision of, or agreement as to, two substantial federal claims. It may be that over the years some few men will have to go to prison because this Court may upon occasion be unable to reach a decision, but such a manner of reaching a result has always been avoided except where absolutely necessary and it is not absolutely necessary where review has been granted with respect to what may be a controlling principle of law.

II

The Court in *Simmons* v. *United States,* No. 55, O. T. 1967 reaffirmed the approval of *Palmer* v. *Peyton,* 359 F. 2d 199 (4th Cir., 1966), given in *Stovall* v. *Denno,* 388 U. S. 293, 301, 302 (1967). Petitioner submits that the facts of his case are simply not sufficiently distinguishable from *Palmer* to support a difference in result:

Critical Circumstances	*Palmer*	*Biggers*
Gap between crime and identification	1 day	7 months
Time during which victim could observe criminal	15-30 minutes	10-30 minutes
Initial opportunity to observe	assailant's head covered by paper bag	opportunity limited by darkness
Voice identification	spoke words used by assailant	spoke words used by assailant
Physical identification	none attempted	yes
Lineup	none	none
Justification for no lineup	none	none
Evidence corroborating guilt	assailant was wearing an orange shirt and Palmer was wearing a similar shirt when arrested; witness stated that Palmer confessed to the crime	none: an eyewitness failed to identify Biggers

Significantly, recent decisions of the New York Court of Appeals and the California Supreme Court read *Palmer* and *Stovall* v. *Denno, supra,* in a way which would require a reversal here, and which suggest (when the grant of certiorari in *Foster* is considered) that Archie Nathaniel Biggers may, fortuitously, be only the hapless victim of a short-lived restrictive interpretation of the due process obligation of the states to provide for fair identification procedures. In *State* v. *Ballott,* 233 N. E. 2d 103 (1967) for example, the facts surrounding the identification are strikingly similar to petitioner's case:

> Miriam Seidman and Rose Scipone worked for the M. N. Axim Lumber Company in Queens County. It was the task of those employees, each Friday, to drive to the bank and pick up the company payroll of about $5,000 and then return to the company's offices with the money in an envelope. On the Friday in question, January 18, 1963, as they were about to alight from their car, a Negro, wearing a hat and a heavy overcoat, with turned up collar, appeared at the window and demanded the envelope, threatening to shoot if it was not turned over to him. Frightened, Mrs. Seidman handed him the envelope and Mrs. Scipone gave him her purse containing $27. The robber then fled.
>
> The defendant was arrested a year later, having been implicated in the robbery by a man named Doyle. The latter, questioned a short time after the robbery, declared that, having learned of the payroll procedure from one of the lumber company's employees, he and the defendant Ballott had planned the commission of the crime. Doyle pleaded guilty to conspiracy to commit larceny, a misdemeanor, and subsequently testified against the defendant.

> Mrs. Scipone testified upon the trial that she had not seen the face of the robber and only Mrs. Seidman identified the defendant as the man who had held them up. It was disclosed, during the course of her testimony, that in January, 1964, a year after the robbery, the police had exhibited to her the defendant, alone in a room in the station house, and that she had then stated that he was the person who committed the robbery. It also appeared that she had identified the defendant only after he had, at her request, donned a hat and a heavy coat—similar to those worn by the robber—and uttered the words—somewhat like those spoken—"give me the money, give me the envelope." Mrs. Seidman acknowledged that she made her identification only after she had heard the defendant speak.

In the California case, the court reversed the conviction even though a lineup was held, *People* v. *Caruso*, —— Cal. 2d ——, 2 Crim. L. Rptr. 3135 (1/26/68):

> But the uncontradicted testimony of all those who viewed the lineup demonstrates that it was conducted under circumstances which could only have suggested to Butkus and Seeley that defendant was the man to be charged with the offense. Defendant is of imposing stature, being 6 feet 1 inch tall, and weighing 238 pounds. He is of Italian descent, with a very dark complexion, and has dark wavy hair. The two victims, the officer in charge of the investigation, Sergeant Allen, and defendant all testified that the other lineup participants did not physically resemble defendant. They were not his size, not one had his dark complexion, and none had dark wavy hair. During the robbery both Seeley and Butkus had noted the driver's

> large size and dark complexion, and, if they were to choose anyone in the lineup, defendant was singularly marked for identification. We can only conclude that the lineup was "unnecessarily suggestive and conducive to irreparable mistaken identification" (*Stovall* v. *Denno* (1967) supra, 388 U. S. 293, 302), and we hold that its grossly unfair makeup deprived defendant of due process of law. (*Stovall* v. *Denno, supra*).

Of course, nothing decided in these cases binds this Court. But the ready, and we submit convincing, application of *Stovall* by the highest courts of New York and California supports a serious re-examination of petitioner's claim. While this Court's precedents are not always capable of mechanical application to subsequent cases, surely it is no accident that both state courts have applied *Stovall* to identification procedures which under no reasonable construction were significantly more likely to produce "irreparable mistaken identification" than those employed by the Nashville police to suggest the guilt of a sixteen year old boy.

In addition, as the Supreme Court of California found in *People* v. *Caruso, supra,* the due process infirmity of suggestive identification procedures is enhanced where the record shows a serious doubt as to the reliability of the judgment of guilt. In *State* v. *Ballott, supra,* and *Palmer* v. *Peyton, supra,* there was independent evidence connecting the defendants with the crime; in Biggers' case, however, a questionable identification of one with no criminal record stands uncorroborated. The state, moreover, treated the jury in a manner which substantially impaired its capacity to appr e that identification objectively: newspapers were used as a forum for grossly prejudicial comment on the case (R. 196, 197); then the jury selected

from those exposed to the papers was reminded of the harmful stories by the prosecution on voir dire (R. 58, 59, 175, 215) and at trial (R. 17); police officers were permitted to testify again and again to the facts of identification although they were not controverted; finally, the jury was subjected to a summation which the Supreme Court of Tennessee characterized as "appealing to racial prejudice" and which the court found to be error—but non-reversible (R. 183, 209, 210). Petitioner respectfully submits that an uncorroborated identification so frail requires a guilt finding process of greater integrity than shown by this record.

CONCLUSION

For the foregoing reasons petitioner requests that the Court grant rehearing and reverse the judgment below.

Respectfully submitted,

JACK GREENBERG
MICHAEL MELTSNER
10 Columbus Circle
New York, New York

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pa.

AVON N. WILLIAMS
Z. ALEXANDER LOOBY
Charlotte at Fourth
Nashville, Tennessee

Attorneys for Petitioner

JOHN P. HOWLAND
Of Counsel

Certificate

I, MICHAEL MELTSNER, a member of the Bar of this Court and counsel for petitioner herein, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

.....

Attorney for Petitioner

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SUPREME COURT OF THE UNITED STATES

No. 237.—October Term, 1967.

Archie Nathaniel Biggers, Petitioner, v. State of Tennessee. | On Writ of Certiorari to the Supreme Court of Tennessee, Middle Division.

[March 18, 1968.]

Per Curiam.

The judgment below is affirmed by an equally divided Court.

Mr. Justice Marshall took no part in the consideration or decision of this case.

Mr. Justice Douglas, dissenting.[1]

Petitioner was indicted for a rape committed when he was 16 years old, was convicted and after a trial by a jury sentenced to 20 years, first to a juvenile facility and later to prison. The Supreme Court of Tennessee affirmed the judgment of conviction. *Biggers* v. *State*, 411 S. W. 2d 696.

On the night of January 22, 1965, Mrs. Beamer was at home sewing, when an intruder with a butcher knife in his hand grabbed her from the rear. Her screams brought her 13-year-old daughter, who arriving at the scene, also started to scream. The intruder said to Mrs. Beamer, "You tell her to shut up, or I'll kill you both." Mrs. Beamer ordered her daughter to a bedroom, and the intruder took Mrs. Beamer out of the house to a spot two blocks away and raped her.

[1] As respects the practice of Justices setting forth their views in a case where the judgment is affirmed by an equally divided Court, see *Communications Assn.* v. *Douds*, 339 U. S. 382, 412–415, 422; *Osman* v. *Douds*, 339 U. S. 486, 487; *Raley* v. *Ohio*, 360 U. S. 423, 440; *Eaton* v. *Price*, 364 U. S. 263, 264.

During the next seven months the police showed Mrs. Beamer numerous police photographs, one of which, she said, showed a man who "had features" like the intruder. The case lay dormant. Mrs. Beamer was unable to describe the rapist other than to state he was fat and "flabby," had a youthful voice, smooth skin, and "sort of bushy" hair.

On August 17, 1965, petitioner, still only 16 years old, was arrested for the rape of another woman. On the same day the police brought Mrs. Beamer to the police station to "look at a suspect." They brought petitioner to the doorway of the room where she sat. She asked the police to have him speak and they told him to repeat the words spoken by the rapist, "Shut up, or I'll kill you." Only after he had spoken did Mrs. Beamer identify petitioner as the man who had raped her; she testified that it was petitioner's voice that "was the first thing that made me think it was the boy." So far as the record indicates, at the time of this confrontation neither the parents of petitioner nor any attorney acting for him had been advised of the intended meeting with Mrs. Beamer.

The indictment followed. At the trial the daughter testified to what she had seen the evening of the rape, but was unable to identify petitioner as the rapist. The only evidence connecting him with the rape was Mrs. Beamer's stationhouse identification. She did not identify him in the courtroom.[2] She testified that she had identified him by his size, his voice, his smooth skin,

[2] Respondent contends that Mrs. Beamer made an in-court identification of petitioner as the rapist. But the portions of the record relied on do not support this claim. After Mrs. Beamer had described the stationhouse identification, the prosecutor asked her, "Is there any doubt in your mind today?" She replied, "No, there's no doubt." The inference to be drawn is that Mrs. Beamer had no current doubt as to the correctness of her previous identification of petitioner at the police station.

and his bushy hair. Three of the five police officers who were present at the identification testified over objection in corroboration of Mrs. Beamer's reaction at the confrontation.

This procedure of identification violates, of course, *United States* v. *Wade*, 388 U. S. 218, and *Gilbert* v. *California*, 388 U. S. 263. Those were cases of lineups and this was not. Yet, though they recognized a suspect's right to counsel at that critical stage, the Court announced they would not have retroactive effect. *Stovall* v. *Denno*, *supra*, and *Simmons* v. *United States*, *ante*, p. —, make it clear, however, that independent of any right to counsel claim, a procedure of identification may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" that due process of law is denied when evidence of the identification is used at trial. *Stovall* v. *Denno*, 388 U. S., at 302. The claim that Mrs. Beamer's identification of petitioner falls within this rule "must be evaluated in light of the totality of surrounding circumstances" with the view of determining if the procedure in petitioner's case "was so unduly prejudicial as fatally to taint his conviction." *Simmons* v. *United States*, *ante*, p. —.

In *Simmons*, identification by use of photographs rather than a lineup was upheld because the bank robbers were still at large, the FBI had to quickly determine whether it was on the right track in looking for Simmons, the witnesses' memories were fresh since the robbery was but a day old, and because the photos pictured persons in addition to petitioner. In *Stovall*, a single-suspect confrontation held in a hospital room was found to comport with due process because the stabbing victim, the sole source of identification, was in danger of death—to have conducted a lineup would have entailed perhaps fatal delay.

We have no such problem of compelling urgency here. There was ample time to conduct a traditional lineup. This confrontation was crucial. Petitioner stood to be free of the charge or to account for it, dependent on what Mrs. Beamer said. Whatever may be said of lineups, showing a suspect singly to a victim is pregnant with prejudice. The message is clear: the police suspect *this* man. That carries a powerfully suggestive thought. Even in a lineup the ability to identify the criminal is severely limited by normal human fallibilities of memory and perception. When the subject is shown singly, havoc is more likely to be played with the best-intended recollections.

As noted, in *Simmons,* where identification was by photograph, the Court stressed that identification was made only a day after the crime while "memories were still fresh." *Ante,* p. —. Here, however, Mrs. Beamer confronted petitioner seven months after the rape, and the sharpness of her recall was being severely tested. In *Simmons,* too, the Court emphasized that the five witnesses had seen the robbers "in a well-lighted bank." *Ante, p.* —. Here, however, there was "[n]o light in the hall" where Mrs. Beamer was first assaulted; from that hall, the assailant took her out of the house through a kitchen where there was "no light," and the railroad track where the rape occurred was illuminated only by the moon. Indeed, the best view Mrs. Beamer had of petitioner was in the hall by indirect light from a nearby bedroom.

In *Simmons,* the record did not indicate that the FBI told the witnesses which of the men in the photographs were suspects. Here, on the other hand, the police told Mrs. Beamer when they brought her to the station house that the man she would see was a "suspect."

Moreover, unlike the *Simmons* case, identification here rested largely on voice. The fact that petitioner had

"the voice of an immature youth," to use Mrs. Beamer's words, merely put him in a large class and did not relate him to speech peculiar to him. Voice identifications involve "grave danger of prejudice to the suspect," as the Court of Appeals for the Fourth Circuit said in *Palmer* v. *Peyton*, 359 F. 2d 199, 201. No one else identified petitioner. The daughter could not; and Mrs. Beamer did not identify him in the courtroom. Petitioner was young and apparently had no previous police record. There was no other shred of evidence against him.

Under the circumstances of this case it seems plain that the police maximized the suggestion that petitioner committed the crime.

Of course, due process is not always violated when the police fail to assemble a lineup but conduct a one-man showup. Plainly here, however, the highly suggestive atmosphere that had been generated by the manner in which this showup was arranged and conducted could not have failed to affect Mrs. Beamer's judgment; when she was presented with no alternative choices, "there [was] then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect." *Palmer* v. *Peyton*, *supra*, at 201. The conclusion is inescapable that the entire atmosphere created by the police surrounding Mrs. Beamer's identification was so suggestive that use at trial of her station house identification constituted a violation of due process. Since this was the only evidence of identification, there can be no question of harmless error. See *Chapman* v. *California*, 386 U. S. 18.

Petitioner is entitled to a new trial unaffected by Mrs. Beamer's station house identification and the testimony of the police officers who were present when it took place. See *Gilbert* v. *California*, *supra*, at 272–273.

The fact that petitioner was a Negro and Mrs. Beamer also is of course irrelevant to the due process question.